No. 309. 84

Brief of Elliott for P. C.

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Supreme Court of the United States.

October Term, 1898, No. 309.

THE OHIO OIL COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA,

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

ARGUMENT FOR PLAINTIFF IN ERROR.

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Supreme Court of the United States.

THE OHIO OIL COMPANY, Plaintiff in Error,	October Term, 1898.
vs.	No. 309.
THE STATE OF INDIANA, Defendant in Error.	

In Error to the Supreme Court of the State of Indiana.

BRIEF FOR THE PLAINTIFF IN ERROR.

Abstract.

On the 12th day of March, 1898, the State of Indiana in its sovereign capacity commenced this action in the Circuit Court of Madison County, Indiana, to enjoin the plaintiff in error from an alleged waste of natural gas by it averred to have been committed.

The complaint proceeds upon the theory that under the provisions of the Act of the Legislature of Indiana, approved March 4th, 1893, that the use of its property by the plaintiff in error as charged in the complaint was unlawful.

See Record, pages 1 to 7.

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The complaint in the present case was an amended complaint, a demurrer having been sustained in said Circuit Court to the original complaint which upon an appeal to the Supreme Court of Indiana was held to be a good complaint.

See opinion printed in the Record in this action commencing on page 15.

After the cause had been reversed in the Supreme Court of Indiana and after the ruling that the original complaint was sufficient upon demurrer, and after the amended complaint above to referred had been filed in said Circuit Court, the demurrer to the complaint filed by the plaintiff in error was overruled.

See Record, page 8.

Thereupon the plaintiff in error filed its answer to said amended complaint. This answer set out in full the statute of the State of Indiana so passed and approved on the 4th day of March, 1893. It further alleged in substance that the plaintiff in error was engaged in the production of oil in said State and that it was not engaged in the business of producing or transporting natural gas; that it had in its service only employees of the highest skill, and that the machinery, devices and process used by it in the production of oil were the most approved known to the world; that the wells in question were drilled in the country remote from any dwelling and were not, in fact, a nuisance; that the oil which was produced from said wells was of more value than the gas that was suffered to escape; it admitted that it suffered some gas to escape but alleged that no more was suffered to escape in the operation of said wells than was consistent with the due

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operation of said wells as oil wells with the highest skill.

It was further alleged that it was impossible to produce oil in such cases without allowing the natural gas that might be found therein to escape and that in the raising of such oil in such wells it used the natural gas found therein as a force, power and agency to raise the oil therein to the surface in order to utilize the same, such being the ordinary and usual way of raising and saving oil in such cases.

It was further alleged in said answer that the said act of the Legislature of Indiana forbidding the production of oil in such case by reason of the escape of natural gas was in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that the same was an unjust discrimination in favor of gas companies and against those engaged in the production of oil and that the construction given thereto by the Supreme Court of Indiana amounted to a confiscation of the property of the plaintiff in error without any compensation.

See Record, page 8 to page 12.

To this answer the defendant in error filed a demurrer, which demurrer was by said Circuit Court sustained, and the plaintiff in error refusing to plead further, final judgment was rendered in the Circuit Court adjoining the plaintiff in error from the use of said walls.

See Record, pages 12 and 13.

Upon such final judgment the plaintiff in error appealed to the Supreme Court of Indiana and in said last named Court it was held and decided that the questions presented by the Record were fully considered and decided against the plaintiff

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in error in the case of *The State of Indiana vs. The Ohio Oil Company, 49 N. E. Reporter, 109*, the same being the opinion set forth in the Record as above herein referred to. And upon the authority of that case the present case was decided adversely to the plaintiff in error in the Supreme Court of Indiana.

See Record, page 15.

From this decision of the Supreme Court of Indiana the plaintiff in error prayed a writ of error and the same was granted by the Chief Justice of the Supreme Court of Indiana, the Honorable Timothy E. Howard, on the 28th day of April, 1898.

See Record, page 36.

And thereafter citations were duly issued and acknowledgment of service had and bond executed duly approved by the Chief Justice of said Supreme Court of Indiana.

See Record, pages 37 and 38.

The errors assigned in this Court are found in the Record on page 39:

1. The Circuit Court erred in overruling the demurrer to the amended complaint.

2. The Circuit Court erred in sustaining the demurrer to the answer.

3. The Supreme Court of Indiana erred in holding that the complaint was sufficient.

4. The Supreme Court of Indiana erred in holding that the answer was insufficient.

5. The Supreme Court of Indiana erred in holding that the said act of March 4, 1893, was not in violation of the 14th amendment to the Constitu-

tion of the United States, and erred in holding that such act of the Legislature of Indiana did not operate to deprive the plaintiff in error of liberty and property without due process of law.

Argument.

The bill of complaint in this suit alleges among other things that the plaintiff in error was unlawfully wasting natural gas. The answer alleges and the demurrer thereto admits the fact to be, that the suit is prosecuted under the act of the General Assembly of Indiana above mentioned, and which act is set out in full in the answer. The question, therefore, is presented whether the said act of the General Assembly of Indiana as construed by the Supreme Court of that State is in violation of the 14th amendment to the Constitution of the United States. It must be admitted under the pleadings, decree and judgment of the Supreme Court of Indiana in this suit, that said statute and the construction thereof by said Supreme Court deprives the plaintiff in error of all right to produce and save oil in its wells within said State. Is such a statute valid either as an exerciser of the police power of the State or as a regulation of the business of producing oil? It is assumed by the State in this cause that it has the right in its sovereign capacity, to regulate and restrict the tapping, by owners of the land, of what it calls the lake or series of lakes of natural gas underlying a number of counties within the State of Indiana. If this assumption was true, we deny the right of the State of Indiana to prohibit the owners of lands under which it is claimed these subterranean lakes of gas are situated from drilling wells for oil on their own land,

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into the strata in which the gas is found, for the purpose of obtaining and utilizing oil and other minerals, even though by their so doing quantities of gas would escape through the wells so drilled into the open air. We, however, deny the assumption on the part of the State that there exists anywhere in Indiana what can with any propriety be called a lake of natural gas. This allegation is so completely in opposition to common knowledge upon the subject that it ought not to have any weight with this Court. No one can define, with any degree of accuracy, at what place or places within the gas belt of Indiana, the oil and gas can be found by drilling for it, nor has it ever been demonstrated that the drilling of a well in one locality will have any effect upon the quantity of gas in another. It is not infrequent that within a short distance of a good gas or oil well, wells are drilled which produce neither oil nor gas.

It has been settled by the great weight of authority that oil and gas in place are a part of the realty, and the owner of the land has the same title thereto as to any other portion of the same. Upon this question we cite the following cases:

In the case of Stoughton's Appeal, 88 Pa. St., 198, the Supreme Court of Pennsylvania said:

> "A guardian has ordinarily power to lease "any of his ward's property of such char- "acter as makes it the subject of a lease; "but without the approval of the Orphans' "Court he cannot dispose of any part of the "realty. Oil is a mineral, and being a min- "eral, is part of the realty, and a guardian "cannot lease the land of his ward for the pur-

"pose of its development, as it would, in effect, "be the grant of a part of the corpus of the "estate of his ward."

In speaking of the character of oil the Court said:

"In this it is like coal or any other mineral "product which, *in situ*, forms part of the "land. It may become, by severance, per- "sonalty, or there may be a right to use or "take it originating in custom or prescription, "as the right of a life tenant to work open mines, "or to use timber for repairing buildings or "fences on a farm, or for firebote. Nevertheless, "whenever conveyance is made of it, whether "that conveyance be called a lease or deed, it "is, in effect, the grant of a part of the *corpus* "of the estate and not of a mere incorporeal "right. In the case above cited this is said "to be so as to leases of coal lands for the pur- "pose of mining, and there is no reason why "the same doctrine should not apply to oil "leases."

And in the case of Gill v. Watson, 110 Pa. St., 312, the Court also said:

"Petroleum is a mineral substance obtained "from the earth by a process of mining, and "lands from which it is obtained may with "propriety be called mining lands."

And in Wettengell v. Gormley, 160 Pa. St., 559, the Court, in discussing the character of the agreement which was an ordinary oil lease, said:

"But this was not an agricultural lease, it "was an agreement known as an oil lease; it "conferred an exclusive right upon the tenant "to take the oil that might underlie the "whole six hundred acres, and gave him fif- "teen years within which to take it. It was "in legal effect a sale of the oil, for the re-

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"moval of which the surface and the sub-sur-
"face were subject to the necessary servi-
"tudes."

And in Brown v. Beecher, 120 Pa. St., 590, the Court said, on page 603.

"The contract referred to was a lease of the
"lands for a specified term, and for a particu-
"lar purpose, at a fixed rent or royalty re-
"served out of the production. As to the legal
"force and effect of this writing there can, we
"think, be no doubt. It conveyed an interest
"in the land; in this respect it is distinguished
"from a license. It is similar to the lease in
"Stoughton's Appeal, 88 P. S., 198, but the
"lease in that case was executed by a guar-
"dian, and it was held, that although a guar-
"dian might lease his ward's land from year to
"year in the usual form for ordinary pur-
"poses, he could not, without the decree of
"the Orphans' Court, bind his ward by a
"lease of the land for oil purposes for twenty-
"one years, for that was practically the sale
"of the oil."

And in Wilson v. Youst, 43 West Virginia, 826, the Court said:

"Petroleum oil, as it is found in the cavity
"of the rock is part of the realty and is im-
"braced in the idea which attaches to the
"word land."

In Ohio the ruling has been the same. In the case of Kelly v. The Ohio Oil Company, 39 L. R. A., 765, the syllabus in part is as follows:

"Petroleum is a mineral, and while it is in
"the earth it forms a part of the realty; and
"when it reaches a well, and is produced on
"the surface, it becomes personal property
"and belongs to the owner of the well."

In New York the same doctrine prevails. In the case of Hughes v. United Pipe Lines, 119 N. Y., the syllabus is in part as follows:

> "Oil in the earth belongs to the owner of "the land and when unlawfully taken there- "from by a wrongdoer the title of such owner "remains perfect and he may pursue and re- "claim the property wherever he may find "it."

In West Virginia the ruling is also the same. In the case of Williamson v. Jones, 39 W. Va., 231, it is held.

> "Oil in place among the strata of the earth "is a part of the inheritance; an unlawful re- "moval thereof is a disherison of him in re- "mainder, constituting waste, which will be "enjoined by a Court of equity."

These authorities show, therefore, that the plaintiff in error, in the operation of the land in question, was the owner both of the oil and gas found beneath the surface. And they also clearly show that such oil and gas is the subject of distinct ownership. It is alleged in the answer and admitted by the demurrer that it is impossible to produce oil without allowing the gas found in the well to escape. The question of malice is disposed of in this action by the averment which is also admitted, that the operations of the plaintiff in error were conducted in entire good faith, with the highest skill and with the best appliances known to the world. Whatever of injury, therefore, that might happen to an owner of other lands, whether joining or remote, must be regarded as incidental and a necessary consequence for which no action either for damages or injunction would lie. If this be a correct statement of the law and if it be true as the answer avers, that it is

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impossible to produce the oil without some escaping of gas, is the Indiana statute an invasion of the federal constitution as taking away the property of the plaintiff in error without compensation, to wit, for forbidding not only the taking of the oil, but also forbidding the use of the gas for the purpose of raising and serving the oil?

2. The Police Power.

If the Legislatdre of Indiana had the right to enact the statute of 1893; if, as we have said before, it is to be construed strictly, it is because it is within what is known as the police power of the State.

It is very difficult to define or limit what is known as the police power of the State.

The proposition is a correct one, however, that it cannot invade a right guaranteed by the Constitution.

This statute applied to the facts and conditions set forth in the answer, we think we have demonstrated, most clearly invades the constitutional right by depriving the owner of his property without due process of law.

The question is a judicial one, and must be determined by this Court.

> "Powers which can only be justified on that "specific ground (that they are police regula- "tions), and which otherwise would be clearly "prohibited by the Constitution, can be such "only as are so clearly necessary to the safety, "comfort and well-being of society, and so "imperatively required by the public neces- "sity, as to lead to the rational and satisfac- "tory conclusion that the framers of the Con- "stitution could not, as men of ordinary pru- "dence and foresight, have intended to pro-

"hibit their exercise in the particular case, "notwithstanding the language of the prohibi- "tion would otherwise include it."

People v. Jackson & U. P. R. Co., 9 Mich., 285.

"Definitions of the police power must, how- "ever, be taken, subject to the condition that "the State cannot, in its exercise, for any pur- "pose whatever, encroach upon the powers of "the general government, or rights granted or "secured by the supreme law of the land."

N. O. Gas Co. v. Louisiana L. Co., 115 U. S. S. C. Rep., 661.

"The police power of a State to regulate the "sale of intoxicating liquors and preserve the "public health and morals does not warrant "the enactment of laws infringing positive "provisions of the Constitution of the United "States."

Walling v. Mich., 116 U. S. S. C. Rep., 447.

I the course of the opinion in this last case the Court say, on page 460:

"The police power cannot be set up to con- "trol the inhibitions of the Federal Constitu- "tion or the power of the United States Gov- "ernment created thereby."

In Mugler v. Kansas, 123 U. S., 661, Harlan, J., says:

"Undoubtedly the State, when providing "by legislation for the protection of the pub- "lic health, the public morals or the public "safety, is subject to the paramount authority "of the Constitution of the United States, and "may not violate rights secured by that in- "strument."

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"While generally it is for the Legislature "to determine what laws are required to pro- "tect and secure the public health, comfort "and safety, under the guise of police regu- "lations, it may not arbitrarily infringe upon "personal property rights; and its determina- "tion as to what is a proper exercise of the "power is not final or conclusive, but is sub- "ject to the scrutiny of the Courts."

"When, therefore, the Legislature passes an "act ostensibly for the public health, but "which does not relate to, and is inappropriate "for the purpose, and which destroys the "property or interferes with the rights of the "citizens, it is within the province of the "Courts to determine this fact and to declare "the act violative of the constitutional guar- "anties of those rights."

In the course of the opinion the Court say:

"What does this act attempt to do? In "form it makes it a crime for a cigarmaker in "New York and Brooklyn, the only cities in "the State having a population exceeding "500,000, to carry on a perfectly lawful trade "in his home. Whether he owns the tene- "ment house or has hired a room therein for "the purpose of prosecuting his trade, he can- "not manufacture therein his own tobacco into "cigars for his own use or for sale, and he will "become a criminal for doing that which is "perfectly lawful outside of the two cities "named—everywhere else, so far as we are "able to learn, in the whole world. He must "either abandon the trade by which he "earns a livelihood for himself and family, "or, if able, procure a room elsewhere, or "hire himself out to one who has a room upon "such terms as, under the fierce competition "of trade and the inexorable laws of supply "and demand, he may be able to obtain from "his employer. He may choose to do his work "where he can have the supervision of his

"family and their help, and such choice is de-
"nied him. He may choose to work for him-
"self rather than for a taskmaster, and he is
"left without freedom of choice. He may de-
"sire the advantage of cheap production in
"consequence of his cheap rent and family
"help, and of this he is deprived. In the un-
"ceasing struggle for success and existence
"which pervades all societies of men, he may
"be deprived of that which will enable him
"to maintain his hold and to survive. He
"may go to a tenement house, and, finding no
"one living, sleeping, cooking or doing any
"household work upon one of the floors, hire
"a room upon such floor to carry on his trade,
"and afterwards some one may commence to
"sleep or do some household work on such
"floor, even without his knowledge, and he at
"once becomes a criminal in consequence of
"another's act. He may go to a tenement house
"and finding but two families living therein
"independently, hire a room, and afterwards
"by subdivision of the families, or a change in
"their mode of life, or in some other way, a
"fourth family begins to live there-
"in independently, and thus he
"may become a criminal without the knowl-
"edge or possibly the means of knowledge
"that he was violating any law. It is, there-
"fore, plain that this law interferes with the
"profitable and free use of his property, by
"the owner or lessee of a tenement house who
"is a cigar maker, and trammels him in the
"application of his industry and the disposi-
"tion of his labor, and thus, in a strictly legit-
"imate sense, it arbitrarily deprives him of
"his property and of some portion of his per-
"sonal liberty.

"The constitutional guarantee that no per-
"son shall be deprived of his property without
"due process of law may be violated without
"the physical taking of property for public or
"private use. Property may be destroyed or
"its value may be annihilated; it is owned
"and kept for some useful purpose and it has

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"no value unless it can be used. Its capacity "for enjoyment and adaptability to some use "are essential characteristics and attributes "without which property cannot be con- "ceived; and hence any law which destroys "it or its value, or takes away any of its es- "sential attributes, deprives the owner of his "property."

In People v. Gilson, 109 N. Y., 389-400, Mr. Justice Peckham says:

"This brings us to the consideration of the "question whether that act is valid as a prop- "er exercise of what is, by way of classifica- "tion, called the police power of the State. "That power has never yet been fully "described nor its extent plainly limit- "ed, further, at least, than this, it is "not above the Constitution, but it is bound- "ed by its provisions; and if any liberty or "franchise is expressly protected by any con- "stitutional provision, it cannot be destroyed "by any valid exercise by the Legislature of "the police power. The extent of this power "has been the subject of discussion in this "Court, and in the recent and most important "case of *In re* Jacobs (98 N. Y., 107) the "question was examined and most exhaus- "tively reviewed by Earl, J., in his opinion. "To reopen the subject now would be useless, "and I refer to that case as authority for the "statement that the Legislature cannot, with- "out reason and arbitrarily, infringe upon the "liberty or the property rights of any person "within the protection of the Constitution of "this State; and that if the Legislature shall "determine what is proper exercise of its po- "lice power, its decision is subject to the "scrutiny of the Courts."

In Colon v. Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the general rule laid down by the foregoing authorities. See also:

People v. Marx, 99 N. Y., 377-387.
People v. Arensberg, 103 N. Y., 399.
Foster v. Scott, 136 N. Y., 577-584.

Whenever the Legislature passes on an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid and nullify the attempt to invade the people's rights.

Nechamous v. Warden, 144 N. Y., 529-535.

See also:

Health Dept. v. Rector, 145 N. Y., 32-39.

An act which deprives a person of a beneficial use of his property deprives him of his property without the due process of law.

In re Firmin St., 17 Wend., 658-660.
In re Wall St., 17 Barb., 639-641.
Gilman v. Tucker, 128 N. Y., 190-204.
H. Ins. Co. v. N. Y., 134 U. S., 598.

In the case of G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S. S. C. Rep., 150, the syllabus is as follows:

"The act of the Legislature of Texas of "April 5, 1889, which provides that any per-"son in this State having a valid *bona fide* "claim for personal services rendered or labor "done, or for damage, or for overcharges on "freight, or claims for stock killed or injured "by the train of any railway company: Pro-"vided, That such claim for stock killed or "injured shall be presented to the agent of the "company nearest to the point where such "stock was killed or injured, against any rail-"way corporation operating a railroad in this "State, and, if the amount of such claim does

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"not exceed $50., may present the same, ver-
"ified by his affidavit, for payment to such
"corporation by filing it with any station agent
"of such corporation in any county where suit
"may be instituted for the same, and if, at the
"expiration of thirty days after such presen-
"tation such claim has not been paid or sat-
"isfied he may immediately institute suit
"thereon in the proper Court; and if he shall
"finally establish his claim, and obtain judg-
"ment for the full amount thereof, as pre-
"sented for payment to such corporation in
"such Court, or any Court to which the suit
"may have been appealed, he shall be entitled
"to recover the amount of such claim and all
"costs of suit, and in addition thereto all
"reasonable attorneys' fees, provided he has
"an attorney employed in his case, not to ex-
"ceed $10., to be assessed and awarded by the
"Court or jury trying the issue, operates to
"deprive the railroad companies of property
"without due process of law, and denies to
"them the equal protection of the law, in that
"its singles them out of all citizens and cor-
"porations, and requires them to pay in cer-
"tain cases attorney's fees to the parties suc-
"cessfully suing them, while it gives to them
"no like or corresponding benefit."

"The mere fact of classification is not suf-
"ficient to relieve a statute from the reach of
"the equality clause of the Fourteenth Amend-
"ment, and in all cases it must appear not
"merely that a classification has been made,
"but also that it is based upon some reason-
"able ground—something which bears a just
"and proper relation to the attempted classi-
"fication, and is not a mere arbitrary selec-
"tion. Tested by these principles, the statute
"in controversy cannot be sustained."

In the course of the opinion on page 154, the Court say:

"It is well settled that corporations are per-
"sons within the provisions of the Fourteenth

"Amendment of the Constitution of the Unit-
"ed States."

"The reasonable enjoyment of one's real
"estate is certainly a vested right, which can-
"not be interfered with or limited arbitrarily.
"The constitutional guaranty of protection for
"all private property extends equally to the
"enjoyment and the possession of lands."

Tideman, Lim. of Police Powers, Sec. 122, page 423.

"In order to lay the foundation of a claim
"for compensation for the taking of property
"in the exercise of the right of eminent do-
"main, it is not necessary that there should
"be an actual or physical taking of the land.
"Whenever the use of the land is restricted
"in any way, or some incorporeal heredita-
"ment is taken away, which was appurtenant
"thereto, it constituted as much a taking as
'if the land itself had been appropriated."

Tiedeman's Lim. of Police Powers, Sec. 121d, page 397.

Under the guise of police power the Legislature cannot invade the rights of persons and property and a statute, the ostensible object of which is to secure the public welfare or safety, must appear to be adapted to that end.

Richey vs. People, 155 Ill., 98.
People vs. Gilson, 109 N. Y., 389.
Calder vs. Bull, 3 Dall., 386; 109 Mass., 315.
Cooley's Con. Lim. 6th Ed., 306, 307, 309.

In Jameison vs. Indiana Natural Gas and Oil Company, 136 Ind., 563, Judge Elliott said:

"The question as it comes to us is not a
'broad one, involving the authority of the Leg-
"islature arbitrarily to enact a law destruc-

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"tive of property or commercial rights under "the guise of exercising police powers, for "here there is regulation and not destruction."

And in this argument in the Flambeaux case Mr. Shirley, on page 20 of his brief, in contending for the constitutionality of that law, says:

"The natural gas statute does not inhibit "the beneficial use by the owner, but only one "particular use, the abuse of which was an evil "threatening, when the statute was passed to "demoralize and ultimately to destroy a great, "if not the staple product of the State. Nor "can it be insisted that the act in question at- "tempted or was intended to confiscate or "seize or forfeit any private right in property."

The Flambeaux statute did not in terms prohibt the burning of natural gas. It allowed the owner to use gas by burning it in certain described burners, and, therefore, the argument may have been said to be pertinent for the reason that the owner was allowed some use.

But in the case in hand, the act of the Legislature, if construed as the State demands, does amount to confiscation, because, under the averments of the answer, which must be taken as true, for the purpose of this case, it is impossible to raise oil without, at the same time, some gas escapes, and, therefore, it is strictly accurate to say that the legislation in question is not regulation, but is confiscation as applied to oil. But even if this legislation is supposed to be a regulation, such regulation must be reasonable and fair and must not amount to confiscation, because, under the doctrine of the cases cited above from the Supreme Court of the United States, property cannot be confiscated, even under the exercise of the police power.

See also:

Health Dept. vs. Trinity Church, 145 N. Y., 32.
Millett vs. People, 117 Ill., 294.

And so, in Davis vs. State, 68 Ala., 58, where a statute made it unlawful to transport cotton in the seed after sunset and before sunrise, the Court said that the prohibition was confined to cotton in the seed, and did not inhibit all transportation, to wit, only at night, while in the case at hand, under the averments of the answer, the legislation in question prohibits the production of oil.

In the case of *In re* Grice, 79 Fed. Rep., p. 627, where the Legislature of Texas passed an anti-trust law that applied to all contracts relating to competition, the Federal Court held the law unconstitutional because not limited to the particular contracts sought to be suppressed; in other words, that the statute was so broad and sweeping that to enforce it according to its terms would be to prevent all innocent enjoyment of owners of property rights. So in the case at bar, the answer alleges that this particular oil well is situate remote from any town or village, and in the country, and that it is operated with the highest skill known to the world, and that in such operation there is no danger to life and property. This averment is by the demurrer admitted, therefore, as applied to such an innocent enjoyment of one's own property, if the statute is to be construed as the State insists, it is so broad and sweeping as to take away property rights without compensation, so as to be an unjust and unreasonable exercise of the alleged police power of the State.

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3. Is the Indiana Statute reasonable?

It was held by Mr. Justice Brown of this Court in the case of Holden vs. Hardy, decided in April, 1898:

> "The question in each case is whether the "Legislature has adopted the statute in ex- "ercise of a reasonable discretion, or whether "its action be a mere excuse for an unjust "discrimination, or the oppression or spolia- "tion of a particular class."

On this subject compare the views of the Supreme Court of the United States in the following cases:

> Barbier vs. Connolly, 113 U. S., 27.
> Soon Hing vs. Crowley, 113 U. S., 703.
> Yick Wo vs. Hopkins, 118 U. S., 356.

In the case at bar it is confessed by the State by its pleadings and argument that the purpose of the Indiana statute was either to postpone all the oil interests of Indiana or entirely to suppress them, and all this to the advantage, interest and profit of those engaged either in producing or consuming natural gas. The business of producing oil within said State being a lawful one, it is submitted that any legislation by the State which either in terms or by the practical operation of the statute results in suppressing the business of the plaintiff in error, is obnoxious to the constitution. It is not competent for the Legislature of Indiana nor that of any other State in the Union to distinguish between two great industries and say that the one may develop and the other be suppessed.

Stratton vs. Morris, 89 Tenn., 497.

In another Tennessee case it was said:

> "Every partial or private law which directly proposes to destroy or affect individual "rights or does the same thing by affording "remedies leading to similar consequences is "unconstitutional and void."
>
> Van Zant vs. Waddel, 2d Yerg., 260.
> See also Eden vs. People, 160 Ills., 296.

These authorities were cited with express approval by Justice Brewer in Gulf vs. Ellis, 165 U. S., 150.

The great reliance of the State in this Court rests upon the case of Townsend vs. State, 147 Ind., 624. That decision was upon what is commonly called the flambeaux act, the same being Section 2316, Burn's Statutes, 1894. (Acts 1891, page 55.) That statute prohibited the burning of natural gas in flambeaux lights, but expressly provided that such gas might be used and burned in burners enclosed in glass globes. It was said, however, in the opinion in that case, on page 628:

> "But the act in no way deprives the owner " of the full and free use of his property. It "restrains him from wasting gas to the injury "of others, to the injury of the public."

And so in another Indiana case the Court said:

> "The question as it comes to us is not a "broad one, involving the authority of the "Legislature arbitrarily to enact a law de"structive of property or commercial rights "under the guise of exercising police powers, "for here there is regulation and not destruc"tion."
>
> Jameison vs. Indiana Natural Gas and Oil Co., 136 Ind., 563.

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For the first time in the history of the State of Indiana the Legislature has attempted in the act under consideration to foster one industry at the expense and destruction of another, each of which industries are in themselves valid and lawful. The theory of the bill is that the exhaustion of gas is certain; but the State contends that the persons who are engaged in the production of natural gas shall be allowed to exhaust it to the exclusion of persons engaged in the other business, wherein natural gas is allowed to escape incidentally to the carrying on of such business. What right does a manufacturer or a gas company have to insist that the owner of land shall not be allowed to produce whatever is contained in it, so long as he does it in the reasonable and ordinary way. As we have above shown, the plaintiff in error was proceeding in good faith, with the highest skill and with appliances the best known to the world in the production of its business, upon its own land. It was producing a commodity, according to the language of its answer, which, when raised to the surface was of greater value than the gas it allowed to escape. This it must be remembered also was being done in the country, remote from any village or dwelling and where the same could not as matter of fact become a nuisance to any one. The only result of this operation according to the language of the bill, is that in raising and saving the oil so owned by the plaintiff in error, that it detracted from and diminished the volume of natural gas in the so-called reservoir under the various counties in Indiana. If it be true that such diminution results, in what respect does it differ from the diminution of the water supply from subterranean springs as shown in the authorities above herein cited?

Again, when we say that a statute must be rea-

sonable we must look to both sides of the question. It must not be one-sided. The contention of the State is that it must have all the gas not merely from under the land that its citizens own, but that it must likewise have all the gas drawn from under the land of the plaintiff in error, thereby depriving it not only of the oil, but the gas also. Besides this, it is alleged in the answer that the plaintiff in error uses the gas which escapes from its wells for the purpose of raising the oil in the wells. In other words, instead of purchasing machinery for the purpose of raising such oil, it uses the machinery which nature has provided.

See also

Smoke Nuisance cases.
City of St. Louis vs. Heitziberg Co., 42 S. W., 954.
Harmon vs. Chicago, 110 Ill., 400.
City of St. Paul vs. Gilfillan, 36 Minn., 298.

4. Does the plaintiff in error waste gas.

Among the definitions given by Webster of waste is "unnecessary destruction." It must be in this sense, if at all, that the State can contend that the plaintiff in error is wasting gas. But the plaintiff in error is engaged in a legitimate and valuable business, its product is of more value under the averments in the answer than the gas wasted, and there is no other way to produce it save the way adopted by the plaintiff in error. Further, it uses the gas that escapes as the power to force the oil to the surface.

Now, in case of the manufacturer, he leads the gas to his boiler through pipes and consumes it by

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burning to produce the steam in the boiler, from which the wheels of his manufactory are turned and the products of his shop turned out The gas thus burned is gone just as surely, just as effectually as the gas is gone that escapes from the wells of the plaintiff in error. But in going it has served its purpose, it has produced the steam from which the factory turns out its products. So with the gas that escapes from the oil well in the case at hand. In escaping it brings with it the more valuable product, oil, and having safely landed it upon the surface escapes and is gone. What is the difference in effect? It must be obvious that the purpose of this statute is to allow manufacturers and gas companies to use and appropriate all the gas in Indiana before any owner of an oil well can operate the same.

And we submit that it cannot be said to be waste, where, as here, of the two products found in the one well, that the more valuable is saved. It is not like the flambeaux case where the owner of the gas for the mere joy of burning and where it did him no good but did his neighbor injury turned the gas into flambeaux lights and burned them day and night. There there was no recompense; there there was no benefit derived by the farmer, and it might well be held in such a case strictly within the definition of Webster that such action on his part was reckless and extravagant waste.

But the State admits by its demurrer in this action that the oil the plaintiff in error saves is of more value than the gas which it uses in producing it. We submit, therefore, that under the facts admitted in this action it cannot be said either as matter of law or of reason that the plaintiff in error is wasting gas.

The case of Cooper vs. Woolley, L. R. 2d Exchеq., 87, is in point upon the question whether

allowing gas to escape under such circumstances is waste. An English statute prohibited the negligent use of furnaces in such a manner as not to make them consume the smoke as far as possible and provided a specific kind of smoke consumer and required the operators of furnaces to use the same. The defendant in that case was prosecuted for failure to use smoke consumers and for allowing smoke to escape. The defendant answered that he was a manufacturer of brass wire, that in the process of such manufacture it was necessary for him to anneal the material, and that if he should equip his furnace with the required smoke consumer that it would be impossible to anneal wire, because in so doing he would let currents of external air into the furnaces and thereby render the temperature uneven. He further admitted that although he was allowing smoke to escape, yet that he was allowing no more to escape than was necessary and consistent with the due exercise of his trade. And on such facts the Court of Exchequer held that he was not liable.

5. The Fish and Game Theory.

So far as we are aware, the first suggestion of an alleged analogy between oil and gas on the one hand and fish and wild animals on the other hand, was in the case of Gas Company vs. DeWitt, 130 Pa. St., 235. But in that case the Judge delivering the opinion himself queried whether the analogy was not too fanciful. And the same language was afterwards adopted by the Supreme Court of Indiana in Gas Company vs. Tyner, 131 Ind., 281. Never until the decision of the case in hand by the Supreme Court of Indiana, so far as we know, was it expressly held that there was any such analogy.

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It seems to us that there can be no foundation whatever for such theory. The difference in the character of the property needs only to be stated to show that a different rule should obtain. In the first sub-division of this brief we have already shown that all the States in the Union wherein gas and oil are produced, other than Indiana, that it has been expressly held that they are apart of the real estate, so long as they are in place. This being true when the State of Indiana parted with its title to the land within the State it thereby granted all the oil and gas that might be found therein as a part of the real estate itself.

By such deed the State lost all its interest as a proprietor in and to said minerals. If we should admit for the purpose of argument that oil and gas have the migratory character ascribed to them by the State, still that does not affect the property character of the two minerals.

The only result is, under all the cases, that if they migrate from the lands of one to those of another they become affixed to the real estate wherever found. And this is so the instant they enter upon such lands whether the owner thereof shall actually reduce them to possession or not. In other words, it needs no action on the part of the land owner to become possessed in fee simple of such minerals whenever they flow or enter upon his lands.

Not so with fish and wild game. By the grant of lands by the State, neither the fish in the streams nor the game in the forests were conveyed. They were not property at all until reduced to possession by some one. It needed further action on the part of some one to complete the title to the fish or the game, and then they were personal property.

Fish and game are animate; they possess within

themselves the power of locomotion; they may pass from stream to stream or from forest to forest without the aid of man. So far as we know, oil and gas remain in place in the strata where they are found until touched by the hand of man, and as we have before said, are a part of the realty and belong to the owner of the land in which they exist.

Again, we suppose that the real policy of the government as to the fish and game was that they should be reserved for the benefit of the people as a food supply. In such matters we apprehend that in case of famine or other public need the State without further ceremony would have the right in its sovereign capacity to capture and take all the fish in the streams and all the game in the forests and deliver them over to the starving. It was intended not merely to reserve the fish and game, but it was intended by so doing that they should grow and propagate and continue to furnish a supply of food for the people. If the proposition was made on the part of some manufacturer in Indiana or some gas company in Indiana was for themselves to take all the fish and all the game, we apprehend the Court would have no difficulty in reaching the conclusion that such proposition must be denied.

But again, if there should be a coal famine in Indiana or a fuel famine in that State we suppose no one would claim that the State would have a right absolutely to enter upon the lands of an individual owner, drill for gas and take the same without any compensation. Such a result must be true, however, if the claim of the State in this case is correct.

We suppose, too, that it would not be competent for the Legislature of Indiana to provide that a man shall keep intact the valuable timber upon his land or that he shall not cut the same down nor sell or

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dispose thereof in any manner. Yet for ages and long before the production of natural gas such was the fuel of this part of the country. And we submit that there is no more justice nor law in the proposition assumed by the State that it may control the gas, shut out the oil and compel the owner of both oil and gas to use the same only as it may suit the pleasure of the State who has no interest therein.

6. Nuisance.

It is asserted by the State and was decided by the Indiana Supreme Court in this case that the acts of the plaintiff in error in the use of the property in question constituted a public nuisance.

It certainly can not be said that such acts were a nuisance at common law. It is well settled that while a Court of Equity will enjoin a nuisance, and that the rights at law need not be first settled, yet it is equally well settled that the Courts require that a complainant should show by his bill that he has a legal right which has been violated.

> Wood on Nuisances, second edition, Section 788.

But in the case in hand what legal right has the plaintiff in error violated? For the purpose of the production of oil and gas upon the land in controversy the plaintiff in error is admitted by the pleadings to be the owner thereof, that is, it also appears from the pleadings that the State has no interest in the land in question nor in the oil and gas therein other than its supposed right as the guardian of the people to protect and save the same for the benefit of the entire State. But we submit that the State has no such interest. Such oil and gas under all the authorities above quoted are the absolute property of the plaintiff in error. There

is no averment in the bill in this case showing that the plaintiff in error is operating a concern either noxious, or noisy or detrimental to the health or happiness of any one. On the contrary, the answer alleges and the demurrer thereto admits that the business is being carried on with the highest skill, with the best appliances, in the usual and ordinary way and in the best way known to the skill and science of the world.

Furthermore, that the operations in question are conducted in the country, remote from village or habitation and where in the nature of things they could disturb no one.

It is apparent, therefore, that the whole of the contention is that the plaintiff in error, by the lawful use of its own property will cause a diminution of the supply of gas which might be obtained at a remote distance from its own property and by others drilling upon their own lands for the purpose of finding and producing gas. We have already shown that for such a diminution of supply that no other land owner would have a cause of action. We quote from the case of Kelly vs. The Ohio Oil Company, supra, the following:

> "The right to acquire, enjoy and own prop-
> "erty, carries with it the right to use it as the
> "owner pleases, so long as such use does not in-
> "terfere with the legal rights of others.
>
> "To drill an oil well near the line of one's
> "land, can not interfere with the legal rights
> "of the owner of the adjoining land, so long
> "as all operations are confined to the lands upon
> "which the well is drilled. Whatever gets
> "into the well belongs to the owner of the well,
> "no matter where it came from. In such cases
> "the well and its contents belong to the owner
> "or lessee of the land, and no one can tell to a
> "certainty from whence the oil, gas or water
> "which enters the well came, and no legal

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"right as to the same can be established "or enforced by an adjoining land owner."

"The right to drill and produce oil on one's "own land is absolute and can not be super- "vised or controlled by a Court or an adjoin- "ing land owner. So long as the operations "are legal, their reasonableness can not be "drawn in question."

It was held also in the case of Letts vs. Kessler, 54 Ohio St., 73, that it was intolerable that an owner of real property, before making improvements on his own land, should be compelled to submit to what his neighbor, or a Court of equity might regard as a reasonable use of his property.

We submit, therefore, that under the pleadings in this case and the facts admitted upon the face of the record that the plaintiff in error was doing nothing except to reasonably use its own property and that its actions did not constitute a nuisance either at the common law or under the statute of Indiana above referred to. And if as incidentally by the said use of its own property the supply of gas elsewhere should be diminished, such injury either to the State or any of its citizens is not a legal injury nor an invasion of any legal rights within the principles of the law.

Neither did such acts of the plaintiff in error constitute a nuisance under the general nuisance statute of Indiana. That statute is as follows:

"Whatever is injurious to health or inde- "cent or offensive to the senses or an obstruc- "tion to the free use of property so as to es- "sentially interfere with the comfortable "enjoyment of life or property is a nuisance "and the subject of an action."

Burns R. S. Ind., 1894, section 290.

The acts of the plaintiff in error did not violate this last named statute of Indiana for the reason

that there is no showing that there is any obstruction to the free use of property by others nor of the comfortable enjoyment of the property of others.

7. Conclusion.

We have abundantly shown, we think, that the title both to oil and gas is in the land owner, and that the State has no title nor legal right thereto.

It is also shown that the effect of the Indiana statute is to take away this property. In the Nebraska Maximum Freight Rate Case, decided by this Court on the 7th day of March, 1898, it was held that the Legislature had no power to take away the property of a railroad where the rate fixed was so low as to render it impossible to operate the road with profit. It was also held in that case that upon such subject the Legislature is not supreme but its acts are subject to the supervision of the Courts.

See also Laughton vs. Steel, 152 U. S., 133.

We believe that this effort by the State to disinherit one of its wards and cast the entire estate upon another is unparalleled in judicial and legislative history. The tendency of the Legislatures of some of the States to take away the rights of one business for the emolument of another is wisely being checked by this Court. The danger attending such legislation and the evil results threatened from popular elections was well set forth by Mr. Tredman in his preface to his book on police power. After showing that the American people for many years after the establishment of this country content with their own liberty and with the freedom from oppression of the Nobles and

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Crown, had no desire to infringe upon the property rights of others.

But in these latter days many such advantages are being sought through the medium of the General Assembly and as his conclusion upon that phase he says:

> "Contemplating these extraordinary de-
> "mands of the great army of discontents,
> "and their apparent power, with the growth
> "and development of universal suffrage, to
> "enforce their views of civil polity upon the
> "civilized world, the conservative classes
> "stand in constant fear of the advent of an
> "absolutism more tyrannical and more un-
> "reasoning than any before experienced by
> "man, the absolutism of a democratic ma-
> "jority."

We submit, therefore, with great confidence, that the judgment of the Supreme Court of Indiana should be in all things reversed.

Respectfully submitted,

STEPHENSON, SHIRTS & FERTIG,
M. F. ELLIOTT,
Attys. for Plaintiff in Error.

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No. 93

Supreme Court, U.S.
FILED
FEB 28 1894
JAMES H. MCKENNEY
Clerk

Filed Feb. 16, 1894.

In the Supreme Court of the United States.

October Term, 1893.

THE STATE OF INDIANA,
PLAINTIFF IN ERROR,
vs. } No. 993.
THE STATE OF INDIANA,
FOR THE USE OF HIGHLAND COUNTY,
DEFENDANT.

BRIEF OF COUNSEL OF THE STATE OF INDIANA.

The act of March 1, 1855, of Indiana, prohibiting the recovery of interest upon it, provides that

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE OHIO OIL COMPANY,
PLAINTIFF IN ERROR,
v.
THE STATE OF INDIANA,
For the Use of Madison County.

No. 308.

BRIEF ON BEHALF OF THE STATE OF INDIANA.

STATEMENT.

This case originated in the Circuit Court of Madison County, Indiana. It is based upon a complaint filed by the prosecuting attorney of that county for the recovery of a penalty provided by the act of March 4, 1893, of the general assembly of the state of Indiana.

Section 1 of that act provides:

> That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe re-

> ceptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles.

Section 3 of the same act provides a penalty of two hundred dollars for each violation, to be recovered in a civil action, in the name of the state, "for the use of the county in which such well shall be located, together with reasonable attorney's fees and costs of suit."

The defendant (plaintiff in error) demurred to each paragraph of complaint. The demurrer being overruled, the defendant answered, in substance, that the escape of gas from its wells, complained of in the complaint, was merely an incident to the production of oil, in which it was engaged; that no more gas was suffered to escape than was necessary; that its well was located remote from any city or town, and was so operated as not to endanger life, health or property; that no known machinery has been devised by which the escape of gas can be prevented, while producing oil from wells where both gas and oil are found in the same stratum of rock, and that the value of defendant's well will be entirely destroyed if it is compelled to desist from permitting the gas to escape, etc. (Rec., pp. 4 to 6, inclusive.)

To this answer the plaintiff demurred for want of facts sufficient to constitute a defense, which demurrer was sustained by the court. (Rec., p. 7.)

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The defendant refusing to plead further, the court rendered judgment in favor of the plaintiff for the amount of the penalty, and one hundred dollars attorneys' fees, after hearing evidence as to the value of such services. (Rec., p. 7.)

Upon appeal to the supreme court of the state the judgment was affirmed on the authority of the State of Indiana v. Ohio Oil Company, 150 Ind. 21, decided a short time previously. (Rec., p. 10.) The opinion in that case is found at pages 11 to 25, inclusive.

Thereupon the plaintiff in error filed its petition for a writ of error to the supreme court of the United States, and the case is brought here on the ground that the statute under which the action was prosecuted violates the fourteenth amendment to the constitution of the United States.

The question involved is, therefore, practically identical with that involved in the pending case of The Ohio Oil Company v. The State of Indiana (term No. 309). The only difference between the cases is the manner in which the question as to the constitutionality of the Indiana statute is raised.

In the last mentioned case the remedy prayed was an injunction, but in both the constitutionality of the same statute is directly involved. The plaintiff in error in each case is the same.

We have discussed the questions presented by the record on behalf of the state of Indiana, in the injunc-

tion case, much more fully than we care to do here, and we respectfully refer the court to the brief filed in that case. We desire, however, to present the questions there discussed in an abridged form here.

ARGUMENT.

Natural gas, as a subject of property, is analagous to animals wild by nature, in that, while in its natural state, and before it has been reduced to possession and control, it is the property of the state in its sovereign capacity.

Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235; 5 L. R. A. 731;

People's Gas Company v. Tyner, 131 Ind. 277; 31 Am. S. 433; 16 L. R. A. 443;

Townsend v. The State, 147 Ind. 624; 62 Am. S. 477; 37 L. R. A. 294.

As a mineral *ferae naturae*, the state may regulate its production and prohibit its waste practically without limit. And in so doing the legislatures of the states are not restricted by the fourteenth amendment to the constitution of the United States, nor by the constitutional guarantics in favor of private property contained in the fundamental law of the states.

Jamieson v. Indiana Gas Co., 128 Ind. 555; 12 L. R. A. 652;

Townsend v. State, 147 Ind. 624;

Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235;

State v. Rodman, 58 Minn. 393;
Gentile v. State, 29 Ind. 415;
Commonwealth v. Gilbert, 160 Mass. 157; 22 L. R. A. 439.

The right of legislatures of the states to regulate the use and prohibit the waste or destruction of property extends not only to that class in which the state, as sovereign, has a qualified ownership, but includes every species of property in the preservation and use of which the public has an interest, either because of its nature, or because the public health, the public safety, the public morals, or the general public welfare in any respect is involved.

Commonwealth v. Alger, 7 Cush. 53;
Bancroft v. City of Cambridge, 126 Mass. 438;
Commonwealth v. Tewksbury, 11 Met. 55;
State v. Schlemmer, 42 La. Ann. 1166;
Cooley's Constitutional Limitations, *pp. 88-89;
18 Am. and Eng. Enc. of Law, p. 745;
Davis v. State, 68 Ala. 58; 44 Am. 128;
Thorpe v. R. & B. R. R. Co., 27 Vt. 142; 62 Am. D. 625;
Hedderich v. State, 101 Ind. 564; 51 Am. 768;
Jamieson v. Indiana, etc., Gas Co., 128 Ind. p. 558; 12 L. R. A. 652;
State v. Peel Splint Coal Co., 36 W. Va. 130;

Health Department v. Trinity Church, 145 N. Y. 32; 45 Am. S. 578; 27 L. R. A. 710;
Rideout v. Knox, 148 Mass. 368;
Slaughter House Cases, 16 Wall. 36;
State ex rel. Clark v. Haworth, 122 Ind. 462;
Lawton v. Steele, 152 U. S. 133;
Commonwealth v. Gilbert, 160 Mass. 157;
Munn v. Illinois, 94 U. S. 113;
Budd v. New York, 143 U. S. 517;
Dow v. Beidelman, 125 U. S. 680;
Mugler v. Kansas, 123 U. S. 623;
Peik v. Railway Co., 94 U. S. 164;
Giozza v. Tiernan, 148 U. S. 657;
Gray v. Connecticut, 159 U. S. 74;
Plumley v. Massachusetts, 155 U. S. 461;
Powell v. Pennsylvania, 127 U. S. 678;
Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361;
United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243, and 88 Fed. 664.

Now it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. * * * In the disposition he may make of it (private property) he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of

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> public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute.
>
> Hague v. Wheeler, 157 Pa. St. 324.

The rights of private property have always been subservient to the higher rights of the whole people, and, whenever it has been shown that a certain use of his property by the owner was inimical to the general welfare, the law-making powers of the several states have never hesitated to interdict such harmful use; and the courts have never denied the existence of such power in the legislature.

> At once concede that the coal industry is a proper subject for the exercise of police regulation and it follows by all the authorities that the legislature, and not the courts, is to judge of the propriety and reasonableness of any given regulation, provided it be enacted for the avowed police purpose and is not upon its face in excess of the police power claimed. *In other words, if any conceivable circumstances would justify the exercise of such police power, the legislature, and not the courts, is the judge of the existence and prevalence of such circumstances.*
>
> State v. Peel Splint Coal Co., 36 W. Va., p. 830.

In the case at bar the legislature of Indiana, with good reason, have seen fit to prohibit the waste of natural gas by suffering the same to escape from the wells into the open air; and the statute containing such inhibition is none the less constitutional because of its alleged interference with the operations of the oil producers, since the rights of the oil producer, as well as of every other individual, must yield to the paramount rights of the public, so far as the general welfare requires. The right of private property has never been so sacred that it might not be disturbed by the state in the exercise of its police power.

> All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community. * * * Without hazarding an opinion upon any other question we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable navigable stream, port or harbor, is not such a taking, such an interference with the right and title of the owner as to give him a constitutional right to compensation, and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property which the legislature have authority to make.
>
> Commonwealth v. Tewksbury, 11 Met. 57.

It is impossible, we think, to distinguish this case from the case at bar. It is as much the duty of the legislature to protect its people against the destruction

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of their fuel supply as it is to protect those who live near the coast from overflow and inundation by the sea.

> The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts in nearly every state in the Union. It is universally conceded to include everything necessary to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. * * * Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.
>
> Lawton v. Steele, 152 U. S., p. 136.

The fourteenth amendment to the constitution of the United States was not intended to and does not abridge the police power of the several states. That power is as much a vital principle in the state governments since as it was before the adoption of the fourteenth amendment. Referring to the anti-oleomargarine law of Pennsylvania, this court said, in Powell v. Pennsylvania, 127 U. S., p. 683:

> It is contended that the last statute is void, in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the

> fourteenth amendment to the constitution of the United States. It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects; and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states.

In that case the manufacturers offered to prove that their compound was entirely wholesome and free from any deleterious substance; but the court held that the constitutionality of the act could not be affected even if such contention were true, that being a matter entirely for legislative investigation.

> No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 31, that the fourteenth amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in re-

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spect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, *and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity.*

Mugler v. Kansas, 123 U. S., p. 663.

The decisions, however, are so numerous and so uniform upon the proposition that the police power of the states was not affected by the fourteenth amendment to the federal constitution that it seems useless to cite them.

It is really only a question as to whether or not, in the enactment of the statute here involved, the legislature of Indiana had in mind the welfare of the people to be conserved by the preservation of the natural gas supply of the state; or whether it was the intention to discriminate against the oil industry for the benefit of some other class or business, using the police power merely as a pretense. Of course there is no claim that if the latter theory was true the act would be valid. But who can doubt not only the good faith but the sound discretion that dictated the enactment of the statute assailed in this case.

The people of Indiana, in great part, had been almost wholly dependent for several years upon the

natural gas supply of the state for fuel. The industrial and commercial system of a large scope of country was based upon the advantages this great fuel supply offered to manufacturing enterprises. Hundreds of them would be shut down immediately if the supply failed. Thousands of employes would thereby be deprived of employment. The poverty and destitution that would follow is easily foreseen, but its extent is incalculable. The history of the natural gas development had already shown, when the act in question was passed, that while the supply was sufficient for legitimate purposes for many years, yet it was susceptible of being exhausted. The discovery of oil in a part of the same territory had occasioned extensive operations for the purpose of securing oil.

It is easy to understand the enormous drain on the gas deposit when hundreds of oil wells are sunk into the gas-bearing rock, each of which, producing enough gas to supply a fair-sized town, was permitted to remain uncapped and the product to discharge in the air. The history of the oil discoveries shows that the number of wells is not expressed by hundreds but by thousands in a few months after a rich discovery. It could thus be foretold, when the act in question was passed, that, unless restrictive legislation was enacted, the gas turned loose in the air would in a little while exceed many times the amount consumed by all the people of the state. It seems to us, therefore, impossible to avoid the conclusion that the welfare of the whole state was directly involved; that the commercial pros-

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perity of the people was in imminent danger and that, indirectly, not only the comfort and happiness but the educational, moral and social life of the community was at stake.

A natural gas deposit is analogous to a surface stream or lake, upon which is borne the traffic of a large community, and on the shores of which great industrial centers are nurtured. That such watercourses are directly within the power of congress or of the legislatures of the states, according to circumstances, to control, can not be doubted. Any obstruction or diversion of the water in such cases, even in the absence of statutory prohibition, is the subject of an action by any one who is injured thereby.

Wheatley v. Baugh, 25 Pa. St. 528;
Haldeman v. Bruckhart, 45 Pa. St. 514;
Saddler v. Lee, 66 Ga. 45;
Cross v. Kitts, 69 Cal. 217; 58 Am. 558;
27 Am. and Eng. Enc. of Law, 424;
New Albany & Salem R. R. Co. v. Peterson, 14 Ind. 112;
City of Greencastle v. Hazelett, 23 Ind. 186;
Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143; 6 L. R. A. 280;
People v. City of St. Louis, 10 Ill. 351;
People v. Truckee Lumber Co., 116 Cal. 397;
Commonwealth v. Pittsburg & Connellsville, etc., Co., 24 Pa. St. 159;
Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361;

Coosaw Mining Co. v. South Carolina, 144 U. S. 566;

United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243;

North Bloomfield Gravel Mining Co. v. United States, 88 Fed. 664.

The discovery of natural gas necessarily involves the application of old principles to new conditions, though we do not believe it necessary for the court to depart from established principles in order to sustain the validity of the statutes designed for the preservation of the gas supply. However, even if that were so, the laws are not so inflexible as to afford no remedy for the injury sure to befall a large community when its chief support is withdrawn.

> It is therefore clear from the principles and the reasoning of all the cases that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location and course. * * * Geology is a progressive and now in many respects a practical science, and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, since the decisions in Acton v. Blundell, etc. * * * probably more deep wells have been drilled in western Pennsylvania than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown and merely speculative as to the flow of water under ground

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had been by experts in such cases as this reduced almost to a certainty.

Collins v. Chartiers Valley Gas Co., 131 Pa. St., p. 159; 6 L. R. A. 280.

So also, with reference to the Indiana natural-gas deposit. It underlies a large territory, several thousand square miles in extent, and its boundaries have been clearly defined. In all essential respects its relations to the industrial life of the people is identical with that of a large surface water-course furnishing power for numerous mills, and constituting a highway over which immense traffic is carried on.

Extraordinary emergencies in many cases call for extraordinary remedies. * * * The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham: "That it is the duty of the courts of equity (and the same is true of all courts and of all institutions) to adapt its practice and course of procedure, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy." This rule the author (Judge Redfield) concludes is certainly worthy of one of the ablest, wisest and best judges that ever administered the chancery law of England or America.

Columbian Athletic Club v. State ex rel. McMahan, 143 Ind., p. 102.

It is difficult to imagine a subject appealing more strongly to the police power of the state for protection than the natural gas field of Indiana. The interests dependent upon it are so vast and affect so many of the people of the state, and the danger which threatened it was so imminent, that the wonder is the legislature of the state did not adopt more drastic measures to prohibit its waste.

In the enactment of the statute in question the legislature of Indiana was simply exercising that well-recognized, but not always clearly defined, function of government reserved to the states, known as the police power; and, this being established, the question as to whether or not the act was wise or unwise, whether or not it was too stringent or too lax, and whether or not it provided the best remedy for the existing evil, are matters of legislative concern purely. However, it must, we think, be conceded that the statute is most reasonable and mild in its terms, and that, if any individual or private interest is hurt by it, such injury is merely an incident in no wise affecting the constitutionality of the act, and not such an interference with or taking of private property as that contemplated by the prohibitions of the fourteenth amendment to the federal constitution.

Respectfully submitted, WM. L. TAYLOR,
Attorney-General of Indiana.

MERRILL MOORES,
C. C. SHIRLEY,
Counsel for Appellee.

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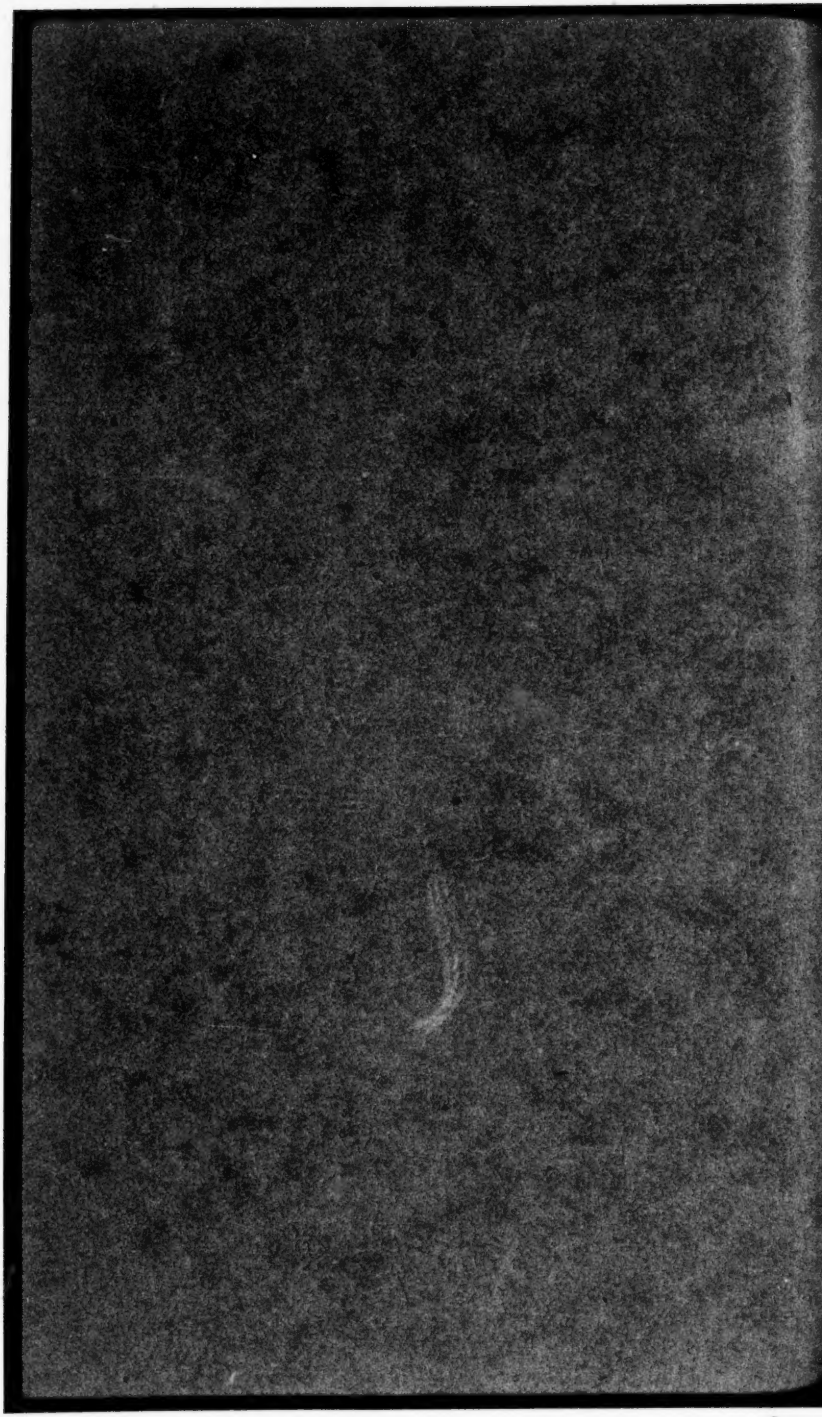

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE OHIO OIL COMPANY,
PLAINTIFF IN ERROR,
v.
THE STATE OF INDIANA.

No. 309.

BRIEF ON BEHALF OF THE STATE OF INDIANA.

STATEMENT.

The amended complaint in this case, which was filed on the 11th day of March, 1898, in the circuit court of Madison county, Indiana, charges, in substance, that for many years prior to that date there had existed underlying a large portion of the state of Indiana a vast deposit of natural gas occupying a reservoir of great extent, with well-defined boundaries, and used for fuel and light by the people of various populous cities of Indiana, as well as the residents of rural districts throughout many of the counties of said

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state; that, for the purpose of supplying the people of the state with such gas for fuel and light, many pipe-lines had been constructed, at vast cost, connecting the gas territory with a large portion of the population of the state; that the fuel and light so furnished was the cheapest and best known to civilization, and that for the purpose of availing themselves of the advantages afforded the people of said state had, at immense cost, equipped their houses with pipes and other appliances necessary to its use; that great manufacturing industries had been built up under the influence of the cheap fuel so furnished, a great number of which were wholly dependent upon the permanent continuance of the same; that these industries, during the years of their existence, had attracted many thousands of skilled laborers and mechanics to said state, who found remunerative employment in the mills, factories and other industrial and commercial enterprises so founded and maintained; that the public institutions, court houses, public school buildings and asylums of the state were supplied with natural gas obtained from said reservoir, and that the comfort, enjoyment, prosperity, and even health of that large community, numbering many hundreds of thousands of people, which for many years had been dependent upon natural gas fuel, would be greatly interrupted and disturbed if it should become exhausted; that on the 25th day of May, 1897, the defendant (plaintiff in error), had caused to be drilled near the city of

Alexandria, in Madison county, in said state, a number of wells, particularly located and described in the complaint; that each of these wells was sunk into the gas-bearing rock, which, as averred, also produced petroleum at that point, and that instead of securely anchoring said wells so as to confine the natural gas produced therefrom the defendant (plaintiff in error) had permitted the gas, for a long time, to escape in the open air, wasting many millions of cubic feet each day, and that defendant threatened to continue indefinitely to suffer the same to escape not only from the wells already drilled, but from other wells which it proposed to drill; that because of the immense drain upon said natural gas reservoir, caused by the open flow permitted by the plaintiff in error, the supply had already greatly diminished, and would in a short time become exhausted with the continued and increased operations threatened by the defendant.

The complaint proceeds to state with particularity the evils that will result from the wrongful acts of the defendant unless prevented by the court, showing beyond all question, if the facts pleaded are true, that nothing short of great public calamity is to be the direct and immediate consequence of the acts sought to be prohibited unless the chancery powers of the court shall intervene.

It further appears from the complaint that, though penalties are provided by law for the wrongful acts described, they have proven wholly inadequate to re-

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press the lawless operations of the defendant and other violators, who have openly defied the constituted authorities in their efforts to enforce the penalties pronounced against them by the statutes of the state. (Rec., pp. 2 to 6, inclusive.)

The defendant demurred to the complaint, and, after its demurrer was overruled, answered setting out the act of the general assembly of the state of Indiana, approved March 4, 1893, under which it is averred the action is prosecuted. This law, it will be observed, provides, among other things,

> That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles.

Section 3 of the act provides a penalty of two hundred dollars for each violation, and an additional penalty of two hundred dollars for each ten days such violation shall continue, to be recovered in a civil action in the name of the state of Indiana, for the use of the county in which said well is located, etc.

The answer further avers that, at the time and before the commencement of this action, it was engaged in the business of producing oil in Madison county, had expended large sums of money in procuring leases and drilling the wells in question; that the gas it was suffering to escape was of no value to it, and was produced merely as an incident to its oil operations; that, by suffering the gas to escape, it was enabled to raise the oil without artificial means, and that there is no known machinery or process by which the oil can be procured without suffering the gas confined in connection with it to escape. The defendant (plaintiff in error) therefore concludes that the act so set out violates the fourteenth amendment to the constitution of the United States, in that

> it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the law. (Rec., pp. 8 to 12, inclusive.)

To this answer a demurrer for want of facts was filed by the plaintiff (state of Indiana) which was sustained by the court, and, the defendant refusing to plead further, judgment was rendered against it, perpetually enjoining and prohibiting it from suffering or permitting any natural gas to escape from said wells and commanding it safely to confine all gas so produced in said wells, in pipes, tanks, or other safe receptacles. (Rec., p. 13.)

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The plaintiff in error appealed from the judgment of the Madison circuit court to the supreme court of Indiana, which, on the 21st day of April, 1898, the case having been advanced, affirmed the judgment of the court below. (Rec., p. 15.) The case was affirmed without argument or extensive comment, upon the authority of an earlier decision of the same case on a former appeal, reported as "State of Indiana v. Ohio Oil Company," 150 Ind. 21.

The opinion of the supreme court of Indiana in that appeal was by Judge McCabe, and is brought into the record of this case *in extenso* where it appears at pp. 15 to 29, inclusive.

On the 28th day of April, 1898, the plaintiff in error filed its petition for writ of error to the supreme court of Indiana. And the case is brought here on the sole ground that the state law incorporated in defendant's answer violates the fourteenth amendment to the constitution of the United States.

ARGUMENT.

It is scarcely necessary, we think, to urge that the natural gas interest of Indiana was, at the time the acts complained of were committed and for a series of years prior thereto, of such magnitude and affected so vitally the commercial and industrial prosperity of the state as to make its preservation a fit subject for regulation by legislative enactment. It was not a matter affecting only a neighborhood, but its influence was

of such wide extent as to have become inseparably interwoven with the industrial and social life of the whole people. It is admitted that this great subterranean fuel deposit filled a reservoir thousands of square miles in area, and that extending from it in every direction were conduits and pipe lines, bringing the volatile fluid into almost every furnace, forge and home within the major portion of the state of Indiana. The territory directly affected included the capital of the state, a city of nearly two hundred thousand people, and many other prosperous cities and towns, ranging in population from fifty thousand downward to the smallest hamlet. Throughout the entire territory reached by these numerous radiating pipe lines scarcely any other fuel than natural gas had been known for years. The very houses of the people (thousands of them) were so constructed as to admit of the use of no other kind of fuel without the reconstruction of the flues and other radical alterations. Millions of dollars of invested capital depended directly upon the life of this fuel supply. These large investments were primarily in manufacturing establishments, where tens of thousands of employes worked, and they, in turn, gave vitality to the commercial enterprises located in their respective communities. Villages formerly capable of supporting a population of a few hundred, or a few thousand at the most, had, since the discovery and development of this great natural resource, become populous and opu-

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lent cities, from and toward which constantly flowed an immense stream of commerce, enriching every department of trade. The very life of every one of these prosperous gas-belt cities depended upon the permanent supply of natural gas to the great factories from which they drew their chief support. To a very great extent the same thing was true as to the larger portion of the state, to which the gas was transported through extensive pipe line systems. The Mississippi river, before the first railroad was built, was not more important to the life and prosperity of the cities on its banks than was the great natural gas deposit of Indiana to the hundreds of thousands of people affected by it. There was, therefore, at the time the act of March 4, 1893, was passed, and at the time the complaint in this case was originally filed, the same broad question of public policy involved that would arise if one of the great waterways of the country should be threatened with permanent obstruction or diversion. The destruction of this natural gas resource, at the time the act in question was passed by the legislature of Indiana, meant not only disaster to the material affairs of its people, but, indirectly, increased vice and crime by multiplying many fold the pauper population of cities and casting upon society a vast army of unemployed mechanics and laborers, who would be absolutely without means of subsistence.

This was the condition of affairs at the time the legislature of Indiana addressed itself to the purpose of prohibiting, as far as possible, the waste and dissipation of natural gas. These are the conditions which must be kept in view in determining the constitutionality of the act assailed by the plaintiff in error. That a subject of such far reaching and vital importance to the whole people is one which properly appeals to the police power of the state, for its preservation must, we think, be recognized beyond peradventure.

The matters to which we have called the court's attention were within the knowledge of the supreme court of Indiana when this case was before it. They were also in the legislative mind when the act was passed. The discovery and development of natural gas, and the almost unprecedented impetus it gave to the business prosperity of the people were all matters of current historical interest. It would, therefore, have been little less than criminal on the part of the legislature of Indiana to have taken no steps to prevent the wholesale destruction of the natural gas supply of the state which at that time and subsequently threatened it.

It is clear, we think, that, in the exercise of their police power, the legislatures of the states are not embarrassed or restricted by the fourteenth amendment to the constitution of the United States.

Commonwealth v. Alger, 7 Cushing, 53;
Bancroft v. City of Cambridge, 126 Mass. 438;

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Commonwealth v. Tewksbury, 11 Met. 55;
State v. Schlemmer, 42 La. Ann. 1166;
Cooley's Con. Lim., pp. 88 and 89;
18 Am. and Eng. Enc. Law, p. 745;
Davis v. State, 68 Ala. 50; 44 Am. 128;
Thorpe v. R. & B. R. R. Co., 27 Vermont, 142; 62 Am. D. 625;
Hedderich v. State, 101 Ind. 564; 51 Am. 768;
Jamieson v. Indiana, etc., Gas Co., 128 Ind. 555; 12 L. R. A. 652;
State v. Peel Splint Coal Co., 36 W. Va. 130;
Health Department v. Trinity Church, 145 N. Y. 32; 45 Am. S. 578; 27 L. R. A. 710;
Rideout v. Knox, 148 Mass. 368; 12 Am. S. 560; 2 L. R. A. 81;
Slaughter House cases, 16 Wall. 36;
State ex rel. Clark v. Haworth, 122 Ind. 462;
Lawton v. Steele, 152 U. S. 133;
Commonwealth v. Gilbert, 160 Mass. 157;
Munn v. Illinois, 94 U. S. 113;
Budd v. New York, 143 U. S. 517;
Dow v. Beidelman, 125 U. S. 680;
Mugler v. Kansas, 123 U. S. 623;
Peik v. Railway Company, 94 U. S. 164;
Giozza v. Tiernan, 148 U. S. 657;
Gray v. Connecticut, 159 U. S. 74;
Plumley v. Massachusetts, 155 U. S. 461;
Powell v. Pennsylvania, 127 U. S. 678;

Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361;
United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243;
North Bloomfield Gravel Mining Co. v. United States, 88 Fed. 664.

Natural gas, unlike ordinary property is, when in its natural state, fugitive and unstable in character, like game in the forest, fish in the streams, or birds of the air. It has, indeed, been held, long before the decision of the case at bar, when in its original position in the bowels of the earth, not to be in the ordinary sense the subject of private ownership. The rule established in Indiana with respect to property rights in natural gas is, we believe, both logical and just. It is to the effect that before it is reduced to subjection and control it belongs to the state in its sovereign capacity. In this respect, natural gas has been aptly styled in Pennsylvania, in Indiana, and elsewhere, where it is largely produced, a mineral *ferae naturae.*

Following this analogy it has been held to bear a relation to the sovereign and to the rule of private ownership similar to that sustained by fish and wild animals.

People's Gas Co. v. Tyner, 131 Ind. 277; 31 Am. S. 433; 16 L. R. A. 443;
Jamieson v. Natural Gas Co., 128 Ind. 555;
Townsend v. The State, 147 Ind. 624; 62 Am. S. 427; 37 L. R. A. 294;

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Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235; 5 L. R. A. 731.

This analogy was first pointed out, so far as we have been able to discover, in the case of Westmoreland, etc., Company v. DeWitt, 130 Pa. St. 235, the doctrine there enunciated being quoted with approval by the supreme court of Indiana in the People's Gas Company v. Tyner, 131 Ind. p. 281. It is as follows:

> Water and oil, and still more strongly gas, may be classed by authorities, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals and unlike other minerals they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract is uncertain. They belong to the owner of the land and are part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner drills his own land and taps your gas so that it come into his well and under his control it is no longer yours but his.

The analogy between animals *ferae naturae* is peculiarly apt. As property the law of necessity operates upon them much in the same way. One cannot wantonly destroy fish in the streams even though on his own land without injuring the public. Neither

can he destroy game birds and animals indiscriminately without, in like manner, injuring the public. The state has always exercised a guardianship over the fish in the streams and the birds in its forests. This is because the public welfare requires their preservation. As articles of food, and even for the pleasure and enjoyment of the people, the public are interested in their protection. It is therefore within the police power of the state to regulate their use.

Not only may the state restrict and control the individual with respect to such property while actually in a wild state, but for the purpose of accomplishing the object of such regulation it may even control the right of the owner of such property lawfully reduced to possession, and, therefore, as much the private property of him who possesses it as any other article of property. It is not because fish and animals, wild by nature, are not the subject of property that the state assumes to control and regulate their use and consumption. On the contrary, nothing is clearer than that they are the subject of private ownership when reduced to possession. It is because, notwithstanding such ownership, the public interest requires the preservation of such animals and fish, that the police power is able to regulate their use and enjoyment by the owner after possession and control have been acquired, as well as before.

The state has no *proprietary* interest in animals wild by nature either before or after their capture. Before capture, however, the state has such interest,

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and only such, as the sovereign possesses in all property belonging to the whole people. After capture they belong, as we have already seen, absolutely to the person taking them.

State v. Rodman, 58 Minn. p. 400.

In that case the legislature of Minnesota had made it unlawful for one to have possession of certain kinds of game within five days of the close season. The argument of those attacking the constitutionality of the act was that game taken at the time was lawfully taken, and when so taken it was not within the police power of the state to regulate it. This is the answer of the supreme court of Minnesota to that argument:

> We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the state, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens, and, to that end, it may adopt any reasonable regulations not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession.

It will be observed that in State v. Rodman the proposition is emphasized that property in wild animals before capture is in the state (by which is meant, however, that qualified ownership which is the attribute of sovereignty). The analogy between such cases as the State v. Rodman and this is exceedingly strong, in that whatever may be the proprietary rights of individuals in natural gas when reduced to possession, so long as it retains its fugitive and elusive character in the earth, flowing continually from one man's property to another's, its relation to the state must be similar to that of wild animals. This we understand to be the Pennsylvania doctrine as established in Westmoreland v. DeWitt, *supra*; and this we understand to be the Indiana doctrine as established by Peoples' Gas Company v. Tyner, *supra*.

But the power to regulate the slaughter as well as the use of and commerce in wild animals and fish is not confined to cases in which the state has even the qualified ownership attributed to it in the Rodman case.

In the case of Commonwealth v. Gilbert, 160 Mass. 157, the supreme court of Massachusetts applied the statute prohibiting the sale of trout at certain seasons, to trout propagated, reared and held as private property; and in the same decision affirmed the constitutionality of the act in this language:

> Nor have we any doubt that the statute is constitutional. The importance of preserving from extinction or undue depletion the trout or other

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> useful fishes in the waters of the commonwealth has been regulated and illustrated in many familiar statutes and decisions from an early time. Such protection has always been deemed for the good and welfare of the commonwealth, and the legislature may pass reasonable laws to promote it. Such laws are not to be held unreasonable because owners of property may thereby to some extent be restricted in its use. It has often been declared that all property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community.

It cannot certainly be contended with reason that the property right of the owner of land overlying a small fraction of the vast subterranean gas deposit is higher, so far as any part of such gas is concerned, than that of one engaged in fish culture, in fish propagated by himself, on his own premises, under his own control, especially after the same are taken from the water and prepared for food.

Much less can it be contended that the interests of the state and of the whole people are less affected by the destruction of the natural gas supply than by the destruction of the fish supply. Not all the fish within the waters of Indiana, since the first white man built his cabin on the banks of the Wabash, have been worth commercially a tithe of the value of the natural gas product of the state for a single year.

In Townsend v. State, 147 Ind. p. 631, the supreme court of Indiana, affirming the constitutionality

of what is known as the flambeau law of the state, enacted, like the statute here in controversy, for the prevention of waste, very justly used, with reference to the former decisions of that court, sustaining the validity of the game and fish laws of the state, the following language:

> That was the assertion of a far greater and more sweeping power than is involved in the act now before us. It only attempts to restrain all persons from drawing from the general reservoir of nature a needless amount of natural gas only to be wasted. All persons in the state are far more interested in preventing such needless waste of gas than they were in preventing the owners of lakes and streams from taking any fish at all therefrom for a period of two years, though for necessary food.

The particular case to which reference was made in the opinion, from which the preceding excerpt was taken, was Gentile v. State, 29 Ind. 415. In that case it was held that a statute prohibiting absolutely the taking of fish from any of the streams and waters of the state for two years immediately succeeding its passage was constitutional as an exercise of police power.

In the same case the court further say, on page 627, with reference to the claim that natural gas was private property, and therefore immune from the operation of the state's police power:

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> While our republican government guarantees the right to pursue one's own happiness, yet that government is charged with the duty of protecting others than appellant in the pursuit of their happiness, and hence the inalienable right to pursue one's own business must necessarily be subject to the same right in all others. Hence, when that right is asserted in such a manner as to conflict with the equal right to the same thing in others it is not an inalienable right, nor a right at all, but is a wrong. * * * If, therefore, it makes appellant happy to waste natural gas for the want of which others are made to suffer and be unhappy as the direct result of such waste, then the pursuit of such happiness is not an inalienable right but a positive wrong. * * * It (the flambeau act) restrains him from wasting the gas to the injury of others, and to the injury of the public. It might present a very different and serious question whether the legislature has the power to prevent him from wasting his own property, if, by so doing, he in no way injured others, as appellant's learned counsel erroneously assume (p. 628).

This, we respectfully urge, is not only a correct but a very clear statement of the doctrine of police power with respect to the protection of the natural gas supply of the state. It recognizes the existence of certain rights in natural gas in its subterranean bed in others besides the land owner under whose land the same is found. If such rights exist it is both competent and proper to protect them by law. The land owner is not, in an unqualified sense, the owner of everything

that may temporarily inhabit the air above his premises or the soil beneath. Natural gas is one of Nature's elements, like air and water. The doctrine of private ownership in land from the zenith to the center of the earth includes all fixed and permanent substances below the surface; but it does not, we think, include natural gas any more than it includes the east wind. The reasons for this distinction are obvious. It is not contended that the individual land owner possesses the air above his property, nor that he has any proprietary interest in the flock of wild birds that happen to fly over his premises. The title to wild animals frequenting his land is not in the owner, and that the legislature, under the police power, has the right to regulate and prohibit the slaughter of game by the land owner is not now open to dispute. He can assert no greater right to take game in the close season on his own land than he can on the land of another.

This title-to-the-center-of-the-earth doctrine, as applied to natural gas, overlooks the essential difference between this species of property and the ordinary minerals. The latter are permanently fixed as a part of the realty; they have no power of locomotion; they are not migratory. On the other hand, natural gas is in constant motion like the air, passing from one man's land to another's, stealthily and imperceptibly, though continually, and it escapes and loses itself the moment it is released from its subterranean confine-

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ment. Why should natural gas, in its original state, be deemed part of the soil any more than wild game or birds in the air? They are alike elusive, migratory and beyond the control or direction of the land owner. The owner of land has no absolute proprietary right to the wild animals that frequent its forests, or fish found in its streams, the birds that inhabit the air above it or the natural gas beneath its surface until they have been reduced to possession. Before that time they belong to the state in its sovereign capacity. There can be no such thing, therefore, as depriving the owner of property in them, even by a legislation absolutely prohibiting the owner from taking them for his private use. One cannot be deprived of what he does not possess; and therefore, since there is no absolute right in the land owner to appropriate this species of property to his exclusive individual use, a statute prohibiting him from so doing deprives him of no right which he before possessed.

An early Indiana statute, to which we have already referred, prohibited the taking of fish for a period of two years from and after taking effect of the act, even by the owner of the lake or stream in which they were propagated. The validity of that law was assailed on the ground that it violated the constitutional guaranties against the taking of private property without compensation contained in the Bill of Rights. To that contention the supreme court of Indiana responded, in Gentile v. State, 29 Ind. pp. 415, 417, as follows:

> And it is claimed that this right to fish may be exercised at all times at the will of the land owner and is not subject to be controlled, restrained or abridged by the legislature. * * *
>
> The proposition of appellant's counsel is erroneous in confounding the exclusive right of the owner of the stream to fish therein with the right of property in the fish before they are taken. But the fish are *ferae naturae*, and as far as any right of property in them can exist it is in the public, or is common to all. No individual property in them exists until they are taken and reduced to actual possession.

The doctrine thus laid down is quoted and approved by the same court in the flambeau case and applied to property in natural gas; and there is both reason and authority supporting the rule so applied. The legislature has the right, for the purpose of conserving the fish and game, not only to prescribe the manner in which, and the season when the same may be lawfully taken, but it has the right absolutely to prohibit its capture.

Natural gas being, like fish and wild animals, the property of the sovereign people, is the especial charge and ward of the legislature, which may prescribe conditions under which property rights may attach. There is no presumption that this plenary power will be abused by the legislature, nor that it can not be as safely lodged in its hands as in the hands of the courts.

If the people of the state in their sovereign power, through their chosen representatives in the legislature,

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should see fit, in the interest of the natural gas resources of the state to provide that no oil should be taken from any portion of the natural gas territory until its gas product had been consumed, upon what constitutional ground could their right to do so be disputed? Certainly not because it is inimical to the fourteenth amendment to the constitution of the United States.

The statute of 1893 operates upon oil and gas in their natural state. It does not undertake to forbid or restrict the use of, or commerce in, such products, after individual property rights have become fixed by reducing the same to possession. The violation of the act complained of occurred not after either product had been reduced to possession, but in the act of subduing the one without any effort to subdue the other.

Exclusive private property right never vests in natural gas or oil permitted to flow into the open air from the mouth of the well.

However, under the doctrine that classifies natural gas and oil with animals *ferae naturae*, the legislature has the right, for the sake of protecting the same when not yet reduced to possession, to restrict, regulate and control the use and commerce in these products even when lawfully in possession.

The plaintiff in error falls far short of establishing the unconstitutionality of the act in question even if its theory of private ownership were conceded. We are aware of no rule of constitutional law exempting

private property from the operation of the police power. The question of title we regard as of only secondary importance. The right of the legislature under the police power to prohibit the waste and regulate the use of natural gas does not depend upon the legal analogy it bears to animals wild by nature. It is subject to the police power both on account of its physical character as an explosive and therefore dangerous element, and also on account of the intimate relation its preservation bears to the prosperity of the whole people; and the general commercial disaster, and the no less important, because indirect, social detriment sure to follow its exhaustion.

Natural gas is to the law a comparatively new thing. There is abundant authority to justify the court in departing, if necessary, from established principles as applied to other classes of property in order to meet the novel conditions created by the discovery and development of natural gas and the immense commercial and industrial system dependent upon it. We think, however, that a careful examination of the cases bearing upon subjects more or less analogous, will reveal the existence of established rules which only need be applied in order to conserve these vast and varied interests, beneficial alike to their promoters and to the whole people.

Natural gas partakes somewhat of the nature of ordinary minerals, and yet is distinguished from that class of property in other important respects. It has

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certain points in common with subterranean waters, but the contrast in character between these two elements is even more striking than their points of similarity. While differing in its subterranean position, the natural gas reservoir of Indiana, so far as the purpose of this inquiry is concerned, bears closer legal analogy to its lakes and rivers than to anything else with which it can be compared. It is similar in its territorial extent, in that its boundaries are reasonably well defined, in that vast commercial interests have been fostered and built up by it and must inevitably collapse when it is drained. These considerations we respectfully insist should outweigh the purely arbitrary distinction that separates subterranean from surface waters. It has sometimes been assumed that natural gas, because found beneath the surface of the earth, is subject to the rules of law applicable to subterranean waters only; and that rights with respect to surface waters have nothing in common with those flowing from the discovery and utilization of subterranean natural gas deposits. This, we believe, is an erroneous assumption. It is true there is a distinction between the relative rights of riparian owners and those through whose soil are found percolations of water. This distinction, however, is not founded upon the arbitrary fact that in the one case the water is above, while in the other it is below the surface of the earth. It can not be denied that to some extent it is founded upon the ancient theory that the ownership

of the soil extends to the center of the earth and includes every substance found in and under it. More especially it arises from the supposed impossibility of determining the course or channel of subterranean streams and the extent, direction and origin of mere percolations of water. But chiefly it is due to the vast disparity between the enormous utilities to which surface waters may be applied as distinguished from the comparatively limited and unimportant uses of subterranean waters. When we say the uses of subterranean waters are limited and unimportant we mean that so far as people in general are concerned the use of any single subterranean stream is limited and unimportant. A spring of water is often of great importance to the man on whose farm it is found, likewise it is often of great importance to the individual to be able to find beneath his soil a vein of pure wholesome water for domestic purposes. The particular spring or vein of water, however, while of great importance to the individual owner, cannot be said to work any important or appreciable effect upon the industrial or commercial system of the state or country. The well or spring may be polluted or diverted without injury to any save the owner himself, or at most a few of his immediate neighbors. Even when the owner is damaged, generally speaking, one of his neighbors is correspondingly benefited, by being able to tap the subterranean vein a little nearer its source; so that the state at large is not affected in the least, and even the immediate com-

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munity feels no detrimental consequences. Of course the question as to whether or not a given territory has an adequate supply of drinking water accessible to its people is one of large importance. But it is the aggregation of minute and wandering veins and percolations not directly connected with each other that together become an immediate factor in the welfare of the people and not the tiny individual current, the source, direction and origin of which are generally unknown. It is therefore not difficult to understand why the courts have often declined to lend their chancery powers to prevent the diversion of subterranean streams and percolations by one land owner at the suit of a neighboring owner. It is worthy of notice, however, that these cases without exception, so far as we have observed, have undertaken to deal with the common law rights of individuals merely. They have not gone so far as to hold, even with respect to subterranean waters, that the police power of the state may not be invoked to protect and regulate the water supply. We have no doubt that sufficient authority exists in the state legislatures to meet any case where the water supply of the people of a large section of the commonwealth is threatened with pollution or exhaustion.

It is upon these and perhaps other considerations quite as much of policy as of principle that, as a general rule, one who diverts a subterranean water course for his own use is not, in the absence of statutory regulations, liable to an adjacent owner whose supply of

water is cut off by such diversion, whereas the authorities universally hold that one who diverts or harmfully obstructs or pollutes the waters of a surface stream is liable in damages not only to the state as the representative of the people, but to the owner whose use of the water below is interrupted.

New Albany & Salem R. R. Co. v. Peterson, 14 Ind. 112; 77 Am. D. 60;
City of Greencastle v. Hazelett, 23 Ind. 186;
Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143;
Osbon v. Chartiers Valley Gas Co., 6 L. R. A. 280;
People v. City of St. Louis, 10 Ill. 351; 48 Am. D. 339;
People v. Truckee Lumber Co., 116 Cal. 397; 58 Am. S. 183; 39 L. R. A. 581;
Commonwealth v. Pittsburg & Connellsville Ry. Co., 24 Pa. St. 159;
Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361, 363, 364;
Coosaw Mining Co. v. South Carolina, 144 U. S. 566;
United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243;
North Bloomfield Gravel Mining Co. v. United States, 88 Fed. 664.

From the opinion of Collins v. The Chartiers Valley Gas Company, 131 Pa. St. 158, we have taken

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the following extract, to which we invite the attention of the court:

> A surface stream can not be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterraneous percolation or stream. One can hardly have rights upon another's lands which are imperceptible, of which neither himself nor that other can have any knowledge. * * * It is therefore clear from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual, or reasonably required, of their existence, location and course. * * * Geology is a progressive and now in many respects a practical science; and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, since the decisions in Acton v. Blundell, etc., * * * probably more deep wells have been drilled in western Pennsylvania than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown or merely speculative as to the flow of water under ground has been by experience in such cases as this reduced almost to a certainty.

In the case from which we have just quoted it was held that one who polluted a subterranean water course flowing fresh water by mingling with its current salt water developed in the process of mining, was liable in damages to one whose supply of fresh

water was thereby destroyed. The case is therefore important in two particulars: first, because it recognizes the progressive tendency of the law and its policy in keeping step with the advancement of science and universal knowledge. Secondly, it recognizes the rule that the doctrine of *damnum absque injuria* is not universally applied, even in cases growing out of the pollution or diversion of subterranean waters.

Where the conditions are similar, there is no reason why the rules of law applicable to surface waters and subterranean waters should be different; and the authorities are to the effect that there is no difference.

Wheatley v. Baugh, 25 Penn. St. 528 (64 Am. Dec. 721);
Haldeman v. Bruckhart, 45 Penn. St. 514, (84 Am. Dec. 511);
Saddler v. Lee, 66 Ga. 45 (42 Am. 62);
Cross v. Kitts, 69 Cal. 217; 58 Am. 558-562 (27 Am. & Eng. Enc. of Law, 424).

Now let us suppose the discovery of a large subterranean stream of water, the source, direction and outlet of which were all perfectly defined. This stream traverses a populous scope of country of great extent, and is of such character that hundreds of factories, in which thousands of workmen find employment, are supplied with power by its current. During the years following its discovery and the development and growth of these industrial enterprises the whole commercial system along its course, and for many miles

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on either side thereof, has become so interwoven with its life and continued existence as to make its diversion, and much more, its complete destruction, no less than a widespread public calamity. Suppose further, that, for some selfish purpose of its own, a large corporation, or combination of capital, should be directed to the diversion of this subterranean current so that its inestimable advantages should be completely lost, and the manifold interests dependent upon it destroyed, will it be seriously insisted that, at the suit of the state, by its attorney-general, in the interests of the people, a court of equity, even in the absence of statutory provision, would be powerless to afford any relief, or to avert such threatened disaster? It seems to us that the question need only be asked in order to carry its own answer. Now, if, in the absence of legislation, such power exists in the courts, much less can it be denied that the legislature of the state, speaking as the direct representative of the people in their sovereign capacity, has the indubitable right, under its police power, to prohibit any such threatened injury to so large a portion of its population? Nor would it be any answer in such a case for the wrongdoer to say, "I own the land on which my operations are being prosecuted, and since my title is from the zenith to the center of the earth, and includes the water flowing through and under my soil, I can therefore divert its current at will, regardless of the welfare of the whole state, and notwithstanding my act may mean ruin, destitution and pauperism to thousands."

Nor is the rule questioned that an owner of land bordering a lake of water on the surface of the ground, would be liable not only to the state, but to every other owner specially injured by his act if he should drain the waters of such lake even to furnish power to run his mill, much more if such waters were drained only to be wasted.

Taylor v. Fickas, 64 Ind. 167; 31 Am. 114;
Hebron Gr. R. Co. v. Harvey, 90 Ind. 192; 46 Am. 199;
Weddell v. Hapner, 124 Ind. 314;
Thunder Bay Co. v. Speechly, 31 Mich. 336; 18 Am. 184;
Morrill v. St. Anthony Falls Co., 26 Minn. 222; 37 Am. 399;
Fernald v. Knox Co., 82 Me. 48;
Delaplaine v. Chicago R. R. Co., 42 Wis. 214; 24 Am. 386.

And if there is sufficient virtue and authority in the equity arm of the courts to prevent a diversion or destruction of a surface stream or lake, or particularly the hypothetical subterranean course we have described, much more ought that same strong arm to be stretched to prevent the absolute destruction of the Indiana natural gas field, with all the attendant evil consequences; because, in addition to the commercial interests at stake, natural gas, from its very nature, invites the exercise of police power. Whatever may be said as to the utility of subterranean waters, or as

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to the uncertainty of our knowledge with respect to their origin, their course, and the extent of the supply, this court will notice certain well-established facts with respect to the great subterranean natural gas lake of Indiana. There is no uncertainty about it. It has well-defined boundaries with reference to which vast commercial interests have adjusted themselves. That it can be exhausted has also been demonstrated, as certainly as that it exists. That it has been a source of incalculable wealth and prosperity, no one will deny. It is impossible that one, who deliberately taps this reservoir with a drill and suffers its contents to escape into the open air, can be ignorant of the tremendous injury which he inflicts upon every one whose property and business directly depend upon the continued existence of the supply. Having knowledge of the consequences of his act, he will be presumed to have intended such consequences. It therefore becomes a question whether the state may, in the exercise of its police power, prohibit the intentional destruction of its greatest natural resource.

The case of Hague v. Wheeler, 157 Penn. St. 324, has been invoked by the plaintiff in error as authority for the doctrine that the owner of the surface, as the owner of everything beneath the surface, may with impunity sink a well upon his own premises into a natural gas reservoir and permit its contents to escape in the air even though the gas under his neighbor's land, and under the land of thousands of others may

also escape in common with his own. That case falls far short of deciding any question essential to the determination of this case. In the first place, the suit was brought by an individual land owner against a neighboring land owner. Secondly, there was no question raised there as to the power of the legislature to prohibit waste. Third, the courts, in deciding that case, distinctly state that the subject is one justifying legislative control, in the following language:

> Now it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells; but it is not the public interest that is involved in this litigation. It is the interest of an adjoining owner, who seeks to appropriate to himself so much of his neighbor's gas as he can not turn into money, or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands, by an injunction, until this appropriation is accomplished.

The closing paragraph of the court's opinion is also quite significant of that tribunal's thorough assent to the proposition that whether the title to subterranean deposits of natural gas be in the surface owner, or in the sovereign, the latter has such an interest as justifies legislation regulating its use and prohibiting its waste. It is as follows:

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> In the disposition he may make of it (private property) he is subject to two limitations. He must not disregard his obligations to the public, he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute, until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.

So far, therefore, from denying the power of the legislature to prohibit the waste of natural gas, the supreme court of Pennsylvania distinctly recognizes the existence of such power, if it does not undertake to suggest its exercise.

It was known as a part of the history of the state, when the act in controversy was passed, that vast investments had been made throughout what is known as the gas belt of Indiana, upon the strength and permanence of this gas supply. These varied interests had adjusted themselves with reference to this subterranean reservoir of gas just as the multiplied utilities of commerce adjust themselves with reference to and depend upon the continued and undisturbed flow of a river, the banks of which are lined with mills operated by the power of its current. This is, as we under-

stand the doctrine of Collins v. Chartiers Valley Gas Company, 131 Pa. St. 143, a vital point in determining the question as to whether the subject is one in which the public has such an interest as to invoke the exercise of the police power of the state. In respect to its uses, its extent, its well-defined boundaries and the mighty interests dependent upon its protection, it is identical with the great water-ways and lakes of the country. It bears little, if any, practical analogy to mere subterranean veins or percolations of water. It is not proper to say, therefore, that those who are thus directly interested, and under whose land this great natural gas lake extends have no better rights in courts of equity to insist upon the protection of the natural gas supply than has the land owner who seeks to enjoin the diversion of a small subterranean vein of water.

It will be observed, too, from examination of the authorities, that the doctrine that permits one land owner to divert subterranean water presupposes an intention on the part of the person so diverting the same to devote it to some substantial use. In this case there is no pretense that the gas suffered to escape from the wells of the plaintiff in error was utilized for any purpose whatever. Its volatile character insures its complete annihilation as a valuable substance the moment it escapes in the air. It is true the answer of the plaintiff in error (defendant below) avers that the gas is utilized in bringing the oil to the surface. This,

however, is no utilization at all. The fact that in escaping the gas causes oil to rise in the form of spray is a mere incident to its escape. The escaping gas is at no time brought under the control of the oil producer in any manner whatever. It elevates, not because the producer wills it, but merely because its expansive force is such that when an outlet is opened it seeks the aperture with such velocity and force as to carry everything before it, and immediately loses its identity in the upper atmosphere.

The adaptability of equity to the changing conditions of modern life and recent discoveries is such as to bring within its operation any subject of such tremendous importance to the general welfare as the preservation of the Indiana natural gas field. This doctrine has been thus expressed by the supreme court of Indiana in a late case:

> Extraordinary emergencies in many cases call for extraordinary remedies. The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham: "That it is the duty of the courts of equity (and the same is true of all courts and all institutions) to 'adapt its practice and course of proceeding as far as possible to the existing state of society and to apply its jurisdiction to all those new cases, which from the progress daily making in the affairs of men, must continually arise and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is

no other remedy.'" This rule the author (Judge Redfield) concludes is certainly worthy of one of the ablest, wisest and best judges that ever administered the chancery law of England or America.

Columbian Athletic Club v. State ex rel. McMahan, 143 Ind. 98; 52 Am. S. 407; 28 L. R. A. 727.

We commend these words to the careful consideration of all those who will see no distinction between the rights of the public in vast reservoirs of natural gas forming a common supply to hundreds of thousands of people, and the ordinary articles of property belonging to individuals and with the disposition of which the public welfare is not in the least concerned. Nor can the rights of the people with respect to this great natural resource be circumscribed by the narrow rules which apply to subterranean percolations of water. We by no means concede that the legislature of the state may not, if it should see fit, regulate the use and prohibit the waste, pollution or diversion of the subterranean water-courses of the state. On the contrary, we repeat, that in case the public welfare should call for legislation of this kind, the rule of private ownership would be deemed impotent to prevent its enactment in the form of reasonable police regulations. However, we are now discussing the essential character of natural gas deposits, together with the rights of individual owners therein and the correlative rights of the public with respect thereto, irrespective of the act of the Indiana general assembly, the consti-

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tutionality of which is assailed in this case. For it can not be successfully maintained that a police regulation violates the fourteenth amendment to the constitution of the United States as an interference with the free use and enjoyment of private property, if the people of the state, through the attorney-general, prior to the enactment of such a police regulation, had the right to prevent, by injunctive proceedings, the acts sought to be prohibited by the legislation in question.

The proposition seems clear to us that this is precisely the situation with reference to the question now before this court. Even if the act of 1893 had not been passed, we have no doubt that the complaint filed by the attorney-general, as a representative of the whole people, would have stated a cause of action calling for the interposition of the prohibitive power of equity. If we are right on this point, then it seems to us necessarily to follow that the statute in question in no wise transcends any provision of the fourteenth amendment to the federal constitution. When the rule with respect to percolating waters was established natural gas was unknown. But, even if known and properly classified with subterranean waters, the rules of equity and of law are sufficiently flexible to accommodate themselves to the advance, even to the revolutions, which science, commerce and the other elements of modern progress have accomplished.

Referring to the anti-oleomargarine law of Pennsylvania, this court, in Powell v. Pennsylvania, 127 U. S. p. 683, said:

> It is contended that the last statute is void, in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the fourteenth amendment to the constitution of the United States. It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects; and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states.

The same doctrine is stated in numerous other cases decided by this court, both before and after the Powell case. From one of them we take the following very pertinent excerpt:

> No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 31, that the fourteenth amendment

had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

Mugler v. Kansas, 123 U. S., p. 663.

It is therefore plain that the police power of the state operates as well upon private property as upon that in which the state as sovereign has a direct interest. If the subject-matter of the legislation is such that the public has an interest in it, then it is a proper matter of police regulation, even though, incidentally, private property may be injuriously affected, or its value entirely destroyed.

The same line of cases hold that the fourteenth amendment was in no wise intended to and does not limit the police power of the states. The right of the legislature to restrict and often to prohibit the use of property in which the public has an interest because dedicated by the owner to a public use has been many times recognized by this court. It is not easy to distin-

guish between the right to regulate property because the public has an interest in it through its dedication to public uses, and the right to regulate property in which the public, in a far broader sense, and in a far greater degree, has an interest because of the very nature of the property itself. The rule probably is the same in both cases; that is, the public has an interest in both cases, being affected by the use or abuse of the property. And who can rationally say that the interest of the public in the rates of toll to be charged by the owner of a grist mill possesses more than a small fraction of importance compared with that which attaches to so tremendous an affair as the natural gas resources of the state of Indiana? Property in natural gas is subject to police regulation on far surer ground than milling property, warehouses, bakeries and similar private investments in which the public have an interest only because a considerable number of people are likely to patronize them.

Affirming the constitutionality of an act pertaining to coal mining the supreme court of appeals of West Virginia, in the case of State v. Peel Splint Coal Co., 36 W. Va., p. 830, say:

> At once concede that the coal industry is a proper subject for the exercise of police regulation and it follows by all the authorities that the legislature and not the courts are to judge of the propriety and reasonableness of any given regulation, provided it be enacted for the avowed police purpose, and is not upon its face in excess

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> of the police power claimed. In other words, if any conceivable circumstances would justify the exercise of such police power, the legislature, and not the courts, is the judge of the existence and prevalence of such circumstances. Citing Munn v. Illinois, supra.

Commonwealth v. Tewksbury, 11 Met. 55, widely known as the Chelsea Beach case, is often cited. That was the case in which Tewksbury was indicted for the violation of a statute providing, among other things, that

> Any person who shall take, carry away, or remove by land or water, any stone, gravel, or sand from any of the beaches in the town of Chelsea * * * shall for each offense forfeit a sum not exceeding $20.

He defended on two grounds: first, that he was the owner of the land in fee, and the statute did not intend to prohibit him as the owner from taking gravel from it.

Secondly, that if the statute did apply to the taking of gravel from the owner's land, it was unconstitutional, under Article 10 of the "Declaration of Rights" of the Massachusetts constitution, which provides that

> No part of the property of any individual can be taken from him or applied to public uses without making him a reasonable compensation therefor.

The opinion is by Chief Justice Shaw, and, after holding the statute applicable as well to the owner of

the land as to others, that great jurist proceeds to dispose of both positions assumed by the defendant, as follows:

> The court are of opinion that such a law is not a taking of property for public use within the meaning of the constitution, but is a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with or injurious to the rights of the public.
>
> All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community. * * *
>
> Without hazarding an opinion upon any other question, we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable navigable stream, port or harbor, is not such a taking, such an interference with the right and title of the owner as to give him a constitutional right to compensation and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property which the legislature have authority to make.

We submit that the statute of 1893 regulating the production of natural gas and oil is far within the boundaries of the doctrine laid down in the Tewksbury case. The gravel removed by Tewksbury was his absolute private property. It had always belonged to himself and predecessors in the ownership of the

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land from which it was taken. It was not migratory nor explosive nor dangerous. He was not required to reduce it to possession to fix his property right in it. Its removal and use did not reduce to any extent the gravel deposit on any other man's land. Its removal, however, was properly prohibited, and its commercial value perhaps entirely destroyed, because the public welfare required that the embankment or break-water formed by the Chelsea Beach remain unimpaired.

Commonwealth v. Alger sustains the constitutionality of the Massachusetts statute fixing a line beyond which riparian owners were prohibited from building private wharves on land of which they owned the fee.

The Rideout case was one which involved the constitutionality of the Massachusetts statute prohibiting the unnecessary and malicious erection by the owner of any fence, or other obstruction, exceeding six feet in height, on his premises, to the annoyance of adjacent owners.

In Lawton v. Steele, 152 U. S., p. 136, this court, affirming the constitutionality of the New York statute authorizing the seizure of fish nets, traps, etc., said:

> The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts in nearly every state in the Union. It is universally conceded to include everything necessary to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. * * *

> Beyond this, however, the state may interfere wherever the public interests demand it. And, in this particular, a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

Davis v. State, 68 Ala., p. 63, involved the constitutionality of a statute restricting the transportation of cotton in the seed between certain hours of the day. With reference to the application of the Alabama constitutional guaranties of life, liberty, property, etc., the supreme court of that state used the following language, in deciding the case:

> It is sufficient to say that this constitutional barrier was "intended to protect property from confiscation by legislative enactments, and from seizure, forfeiture and destruction without a trial and conviction by ordinary modes of judicial proceeding." It is not, nor can it be maintained, that the act in question goes or attempts to go this far. It has never been seriously questioned that the *jus disponendi* is not an absolute, unqualified, or indispensable right attaching to property, but is subject to such regulations not inconsistent with the constitution, as in the judgment of the law-making powers the interests of society and good government may require. Citing Wynehamer v. People, 20 Barb. 567.
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> The prohibition in section 2 against transporting or moving is confined to "cotton in the seed" and such hours intervening between sunset of one

day and sunrise of the succeeding day. It does not inhibit all transportation, but seeks only to regulate and control it in one particular condition of a commodity. We regard this as a mere police regulation, the alleged impolicy or injustice of which is beyond the legitimate scope of judicial criticism. The primary object of this law is not to interfere with the right of property in its vendible character. Its object is to regulate traffic in the staple agricultural product of the state so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment. This the legislature had the power to do. There is no constitutional objection to it. Citing Munn v. Illinois, *supra*.

In the case at bar the primary object of the statute is not to prohibit the development, transportation and sale of petroleum. Unmistakably, whether judged by its terms or by the circumstances attending its passage and the evils sought to be remedied, its only object was to prevent gas and oil operators from suffering either oil or gas to escape in the open air. Where only one of these products issued from any given well there was little danger of its violation; but it sometimes happens that both gas and oil are found at the same level, and when this is the case, if the operator happens to be interested in oil and has no interest in the gas supply, he simply leaves his well uncapped,

placing a device in position to catch the oil, while permitting the gas to escape. In such case the effect of the statute would be, not to forfeit or confiscate any part of the land owner's property, but merely to compel him to confine the gas while taking the oil out, or if that is impracticable, to postpone the oil operations until the gas has been exhausted, by the legitimate uses to which it is constantly being put. There is no discrimination against any individual or class attempted. Natural gas is a dangerous explosive, liable to destroy life and property; and it is a noxious gas which pollutes the air, when permitted to escape, to such an extent as to cause sickness, asphyxiation and death to those who breathe it. It is therefore competent for the legislature not only to control and prohibit its waste as a measure of economy, but to fix conditions and safeguards practically without limit to which its production and use shall be subject.

> Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.
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> Peik v. Chicago, etc., Ry. Co., 94 U. S., p. 178.
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> If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature can not be stayed from providing its discontinuance by any incidental inconvenience which individuals or corporations may suffer.

Beer Company v. Massachusetts, 97 U. S., p. 32.

> If a subject is within the legislative power, the question whether that power is wisely or unwisely exercise is not a judicial one. If the power exists, then the legislature must determine the mode of its exercise unless the mode is prescribed by the organic law. If, to descend from a wide generalization to a narrow one, a subject is within the police power of the state, the question as to what regulations are proper or needful is one for legislative consideration and decision. It is a cardinal principle of law that legislative discretion can not be controlled by judicial decisions, and is not subject to judicial surveillance.

Jamieson v. Indiana Gas Co., 128 Ind., p. 561.

It is true that the act in controversy was passed upon the theory that the waste of gas in the manner contemplated by the statute involved an assault upon the general commercial welfare of the people rather than that the public morals, or public health was endangered. The authorities, however, from which we have just quoted, are in point because whatever threatens the general commercial welfare belongs in the same category with that which imperils the public health or public morals. We think the cases heretofore cited sufficiently establish this proposition. The fact that the plaintiff in error is an oil producer, and that the complaint does not show that it is wasting the oil produced is no excuse for wasting the gas. It may be conceded, for the sake of argument, that the

oil can not be produced without wasting the gas, when both are found at the same level (a most violent and wholly unwarranted assumption). Yet how does that help the position of the plaintiff in error? Will its learned counsel insist that a person may pursue with impunity a business that not only threatens destruction to the property of his neighbors, but puts in peril the property of the whole state, merely because he can not pursue his business at the particular place where he desires to conduct it without inflicting such injuries? Will they further insist that even the state is powerless to prohibit the continuance of such business, though the existence of its greatest natural resource is directly involved?

That is precisely the position of the plaintiff in error, and the other Alexandria oil producers. There are many places in the state of Indiana, as the legislature which enacted the statute of 1893 well knew, where oil may be produced without penetrating the gas deposit at all. It is equally well known that, where the two substances are found in the same reservoir, the oil will still remain to be produced and utilized after the gas is exhausted. The owners of the land under which it exists may reap the profits it insures after the full benefits of the natural gas deposits have been enjoyed. The question as to whether or not it was wise or politic or just for the legislature to attempt the conservation of the natural gas supply at the risk of curtailing the profits of the Ohio Oil Company be-

longed to that body as the law-making power of the state.

Many of the cases to which we have called the court's attention involved the consideration of state constitutions rather than the fourteenth amendment to the organic law of the nation, but in every one of them a constitutional provision similar in terms to those of the fourteenth amendment was invoked as a prohibition against legislation similar in character to that of the act now in controversy; and in most of them the issue was squarely raised as to the application of the fourteenth amendment. But, in all, the principle is distinctly enunciated that provisions in the organic law, whether state or national, designed to protect the life, liberty and property of the individual, have no application to the legitimate exercise of police power.

It is not contended by us that the legislature may arbitrarily prohibit the use and enjoyment of private property in which the public has no interest merely under the pretext of exercising police power; but within its legitimate domain it would be difficult to imagine a power more plenary or comprehensive. The only point to be determined is whether the subject is one for police regulation. If not, any act in relation to it, which seriously impairs or restricts the use of private property without compensation, is generally speaking void under the constitutional guaranties of the fourteenth amendment, as well as those of the fundamental laws of the several states. On the other

hand, if the subject be one upon which the police power of the state may rightfully operate, then practically the fourteenth amendment has set no bounds to the legislative will; for within its domain the legislature is as supreme as are the courts within theirs. Whether the value of private property is impaired, or its use greatly restricted, are matters absolutely of no consequence in determining whether or not an act of the state legislature relating to any proper subject of police regulation is violative of the inhibitions of the fourteenth amendment. The police power of the state is not circumscribed by that article. The guaranties of "life, liberty and property" therein contained were not intended to and do not affect the exercise of police power by the legislatures of the several states. Indeed, it is an indisputable fact that, in the exercise of that power over subjects properly within it, property is frequently taken "without due process of law." In the "taking of property" under the police power there is no implication that the owner will have compensation for it. In determining, therefore, the constitutionality of an act like that now under consideration we inquire, not whether the act is a reasonable or proper exercise of police power, but whether or not it is an exercise of police power at all. In other words, there is, we insist, properly speaking, no such thing as an unwarranted exercise of police power of the legislatures of the states. An act assuming to be passed in the exercise of police power is either valid by force

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of the legislative will directing its enactment, or it is void because it does not, properly speaking, belong to that class of legislation known as police regulations. This general principle has, we think, been uniformly recognized. Police power is a distinctly legislative power. The courts have no function with reference to it except to give force and effect to the legislative purpose. With the question as to whether or not a given statute is too drastic or too loose or ill-advised they have no concern. In this connection we venture to quote the following from the opinion of Judge Elliott, of the supreme court of Indiana, in State ex rel. Clark v. Haworth, etc., 122 Ind. 462, wherein (on p. 467) he adopts the language of Mr. Justice Bradley in the legal-tender cases:

> If it be true that the power is a legislative one, then it is indisputably true that the courts can not control the legislative discretion. This principle is elementary in constitutional law, and it needs no support from precedents or decisions; but the principle has been so well expressed by Mr. Justice Bradley that we quote his language. Replying to an argument that the mode in which the power was exercised was improper, this great judge said: "The answer is, the legislative department being the nation itself speaking by its representatives, has a choice of methods, and is the master of its own discretion." * * *
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> We have adopted and applied this rule, and indeed we can not depart from it without a disregard of principle that no decision or precedent would excuse.

At least so far back as the Slaughter House cases, 16 Wall. 36, the application of the fourteenth amendment to matters of police was denied by this court. And the principles there enunciated have been uniformly followed in the later cases.

Giozza v. Tiernan, 148 U. S. 657;
Gray v. Connecticut, 159 U. S. 74;
Plumley v. Massachusetts, 155 U. S. 461;
Budd v. New York, 143 U. S. 517;
Lawton v. Steele, 152 U. S. 133;
Powell v. Pennsylvania, 127 U. S. 678.

The federal courts, when called upon to review an act of a state legislature, have not been vigilant in seeking technical constitutional objections to it. The diverse conditions existing in the several states, widely separated as to the character of their population, industrial enterprises, social life and other characteristics, require that the legislature of each state shall have large discretion in determining what laws are best calculated to promote the general welfare of its people; and whoever assails the constitutionality of the statute passed by the legislature of any state, operating equally as to all persons and property within its jurisdiction, and attempting no discriminating restrictions against the rights of other states, and the citizens thereof, must point out some provision of the federal constitution to which such statute is clearly repugnant. The following language of Mr. Justice Harlan, in Plumley v. Massachusetts, 155 U. S., p. 479, seems

to us to apply with special force to the Indiana law here in controversy.

> We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the states to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and state authority. But in view of the complex system of government which exists in this country, "presenting" as this court, speaking by Chief Justice Marshall, has said "the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union," the judiciary of the United States should not strike down a legislative enactment of a state —especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.

We can perceive no constitutional principle that would deny to the legislature of Indiana the right to protect its people in the comfortable enjoyment of what has become a necessity to them, in the form of natural gas procured from the great subterranean reservoir within the borders of the state, while conced-

ing the right in the legislatures of the states absolutely to prohibit the manufacture and sale of oleomargarine and similar substances and compounds intended as a substitute for butter.

It is claimed upon the highest scientific authority not only that certain of these compounds are wholesome and wholly free from any deleterious substance, but that they are positively far better for food than dairy butter; but the federal judiciary has steadily refused to take from the law-making power of the states, where prohibitive legislation of this class has been enacted, the right to absolutely and finally decide the question as to whether the public health of the people required the inhibitions launched against the traffic.

The natural gas supply means far more than commercial prosperity to the people of Indiana. That alone, however, would justify the enactment of rigid laws to prevent its waste; but the public morals are inseparably associated with the business prosperity of the people. The same is true of the public health as well as the educational and social status of its population. The effect upon the social, educational and moral life of the people that would result from the exhaustion of natural gas, and the consequent poverty, idleness and destitution that would inevitably follow, is simply incalculable.

It requires no expert in the science of sociology, however, to foresee, as the immediate and direct re-

sults of such a calamity, an immense deterioration
the moral and social standard.

The numerous decisions of this court affirming t
constitutionality of state laws regulating the tolls
warehouses, mills, and other business enterprises
voted more or less to public uses, have settled the d
trine that police power is not confined in its operati
to subjects affecting the public health, the public m
als or the public safety. The fourteenth amendme
is not more restrictive upon the power of the sta
than is the fifth amendment upon the power of c
gress, and it is abundantly established that the p
vision of the latter article for the protection of li
liberty and property does not prevent congress fr
protecting the harbors and rivers and other territo
within its jurisdiction, even though such legislati
should incidentally cripple or destroy large inve
ments in private business of a perfectly lawful ch
acter.

United States v. North Bloomfield Mining C
81 Fed. 243;
Murray's Lessee v. Hoboken Land Co.,
How. 272.

The North Bloomfield Gravel Mining Compa
case grew out of certain hydraulic mining operati
conducted by that company. It was claimed, on
half of the government, that the waters of the riv
into which the mine drained, were "obstructed" by
deposit thus carried into the stream. An act of c

gress made the operations of the mining company unlawful because of their effect upon the river; and a bill was filed in the United States Circuit Court for the Northern District of California, for injunction. The constitutionality of the act of congress was assailed by the mining company on much the same ground as that occupied by the plaintiff in error in its attack upon the Indiana statute; but the circuit court not only held the law constitutional, but very emphatically declared the legislation in question to be conclusive as to what constituted an obstruction, and this without reference to its effect upon the mining company's business.

The case was again before the Circuit Court of Appeals, and the decision is reported 88 Fed. *supra.*

The doctrine enunciated in this case is that congress need not stop to inquire what may be the effect upon some one's private business when about to enact legislation for the protection of navigable rivers, or other subjects within its control. The business of hydraulic mining is certainly a legitimate one. In California it is perhaps the principal industry of the state. The North Bloomfield Mining Company, so far as disclosed by the opinion, was depositing no more refuse in the river than was absolutely necessary in the operation of its business. On the contrary, as we understand the case, the continuance of the company's business was involved in the question of its right to discharge the substance into the river. In denying such

right the United States circuit court, according to the definition contended for by the plaintiff in error, was "confiscating" the mining company's property. That argument, however, was not permitted for one moment to impeach the constitutionality of the act of congress, nor to stay the injunctive relief prayed for.

Much was said in the state court about the averment of the oil company's answer to the effect that the oil product issuing from its wells was of greater value than the gas product, and it will be argued that there is a question of public policy raised by this averment appealing strongly in behalf of the plaintiff in error. It will be observed, however, that the answer only refers to the particular wells mentioned in the complaint; it does not pretend that the oil interest at large even approached in value and importance the natural gas interests imperiled by the operations of the plaintiff in error; and, in determining whether or not the act in question is constitutional, we are dealing with the broad question of comparative value to the public, instead of the narrow question as to whether the particular wells operated by the plaintiff in error produced gas or oil of greater value. We have no idea of conceding that, even though the injury done to the oil interests was largely in excess of the benefits accruing to the public, through the restrictive legislation concerning waste; such legislation must therefore be invalid. On the contrary, it was for the legislature, and not the courts, to determine the policy or impol-

icy of such legislation, and one would not even cast suspicion upon the constitutionality of the act by demonstrating its economic folly.

Still, it is not profitless to look at the economic side of the question as it appears from the history of the natural gas and oil development in Indiana; and it is impossible to do so without perceiving the immense importance of the natural gas supply, and the comparative inconsequential character of the oil interest.

At the end of 1896 the total oil production of the state of Indiana, as shown by the report of the state geologist, was only fifteen millions one hundred thirty-six thousand and fifteen barrels, worth, in round figures, seven millions of dollars. This represented practically the total acquisition to the state from its oil product; since oil, unlike gas, does not attract industrial enterprises, nor develop the material resources of the locality where the same is found, except to the extent that its market value may enrich its producers. On the other hand, the chief value of natural gas to the state lies in its immense influence upon the development of its industrial system, as well as the inestimable contribution to the comfort, enjoyment and happiness of its people. The effect of natural gas upon the wealth and development of the community where the same is found is very well illustrated in the history of Madison county, Indiana, where the operations of the plaintiff in error were carried on and where this suit was originally brought. In

1887 (when natural gas was first discovered in that county) the total assessed valuation of its property, real and personal, was nine millions eight hundred thirty-seven thousand five hundred ninety-five dollars. Under the mighty impulse which the discovery of natural gas gave to its commercial and industrial activity the assessed valuation increased, within the next ten years, to more than thirty-one millions of dollars; in round figures a gain of about twenty-one millions of dollars, or three times the total value of all the petroleum produced in the entire state since its discovery.

Now what was true of Madison county was equally true of a great many other counties; and these figures represent the net gain in wealth, whereas the figures given as the total value of the oil production represent the *gross* value, with no deductions for the cost of producing.

Furthermore, the larger portion of the oil product was obtained from the non-gas-bearing rock, and it was merely to facilitate the oil production for the limited and comparatively unimportant territory, where the oil and gas are found together in the same rock stratum, that it was proposed to sacrifice the entire natural gas interests of the state.

All these facts, so far as they had been demonstrated at that time, were before the legislature when the act of 1893 was passed. Gas and oil had both been discovered within the state several years prior to that time. Their relative importance to the public

was known. As to how far the preservation of the gas would cripple the production of the oil, if at all, was a legislative question purely.

The plaintiff in error can not in this court argue the unconstitutionality of the act in question merely because certain wells owned by it produce more oil than gas.

That the act in question was a perfectly legitimate and proper exercise of police power seems clear to us, both on principle and authority.

Respectfully submitted,

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